No. 3896

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PRESIDIO MINING COMPANY (a corporation), WM. S. NOYES, B. S. NOYES, L. OSBORN, JOHN W. F. PEAT and L. M. DOHERTY,
Appellants,

vs.

W. S. OVERTON and CARL A. MARTIN,
Appellees.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

First.

THE BRIEFS HEREIN.

The briefs filed herein on behalf of the appellees, and on the part of the receiver, furnish no answer to the contention presented by the appellants: those briefs lack that systematic presentation which is the product of clear thinking: much that is diffuse and irrelevant appears in them; and, especially when read in the light of prior decisions of this court in this litigation, furnish no equitable reason why the expense of the receivership should be charged against the party who successfully resisted it.

After reading these briefs we find ourselves compelled, by reason of their diffuse and unsystematic

character, to present a running commentary upon their contents; and if that commentary itself should be found to be desultory, that characteristic should be attributed to the desultory nature of the material with which we are dealing. These briefs are subject, we think, to well founded criticism; and, unfortunately, the criticism which we beg leave to offer is provoked, not only by the contentions themselves which are presented in these briefs, but actually by assertions made therein which we believe to be unsupported by the record.

A "one-man case."

On opening the brief for appellees and on the first page thereof we find the assertion made that

> "this litigation has not been conducted solely by Overton and Martin, as has at all times been urged on appeal by the appellants, but nine other minority stockholders of defendant Presidio Mining Company have *at all times* actively aided in the prosecution of this litigation in their own interests."

We are unable to find that this typical statement is justified by the record; and we challenge the appellees to name the page in the record of the trial court, or the page in the record on appeal prior to the application for the rehearing, which shows that a single stockholder, Overton apart, at any time "*actively aided*" in the prosecution of this litigation. The truth is that throughout the hearing before the trial court, throughout the argument of the original appeal, and up to the granting of the order for the rehearing, the solitary stockholder who displayed any activity in the prosecution of this litigation was Overton, Martin being conspicuous by his silence and inactivity.

The statement is then made that

> "there is on file in this court the petition of these minority stockholders asking leave to intervene, filed February 9, 1920, regularly argued and submitted to this court, but never decided by it";

"Army Minority Stockholders'" Petition.

but here, characteristically, only part of the story is told. The facts in this connection are all matters of record, and misleading half statements concerning them should not be tolerated. The truth is that when these present appellants filed their opening brief upon the original argument of the main case, they called attention, in a most pointed way, to the litigious ubiquity of Overton and the impressively significant silence of all the other stockholders, including even Martin (Op. Brief, pp.2-7); that aspect of the case was discussed by counsel in the various briefs; and it was adverted to in the original opinion which was handed down by this court on October 27, 1919. After this came the "peti-" tion for a rehearing on behalf of appellees W. S. Overton and Carl A. Martin", which application, so limited, was filed on February 3, 1920. By this time it began to be apparent that the solitude of Overton should be, nominally at least, to some extent relieved; and spurred by the criticisms of the present appellants, he and his counsel prepared and filed the so-called

> "petition of army minority stockholders group to intervene as parties herein and show their authorization, support and ratification of the litigation and for the re-entry of Col. Carl A. Martin as a party to the action".

This petition was filed on February 9, 1920, but its history did not end then. If it were true that these petitioning army minority stockholders had "at all " times actively aided in the prosecution of this litiga-

" tion", as asserted in the brief under consideration, it is difficult to explain why this petition should have been filed at all; and if the claims of the appellees in this present brief be founded in fact, it is equally difficult to explain why, if Martin were the active participant which he is now asserted to have been, any petition for " the re-entry of Col. Carl A. Martin as a party to the " action", should have been filed at all: the filing of this petition was of itself a distinct admission that the sole, active promoter of this litigation was Overton. This petition of these army minority stockholders was not signed or verified by the "army minority stockholders", or apparently by any of those whom the solicitor referred to as having seen "in the flesh" (Trans. 3253, p. 1505, ad finem). On the contrary, this petition was verified by Constance Mills Overton, Overton's wife, and by no other person whomsoever, and that, too, without any statement that she was authorized so to act by a single other minority stockholder, or that in any way she was acting on behalf of any one of them. But this is not all. On February 9, 1920, this army minority stockholders' petition was ordered submitted for consideration and decision, but, on February 18, 1920, and before any action had been taken thereon, a dismissal of this petition was filed on behalf of Constance Mills Overton, trustee for the stock of Belle Congdon, and not in her own behalf, Jennie S. Adler and Mary L. McKittrick. Thereafter, and on May 21, 1920, the rehearing was granted, following which the whole case was rediscussed, and an opinion handed down which, while not referring in so many words to this army minority stockholders' petition, nevertheless disposed

of every essential feature of the cause. But no other, further, different and/or additional application was made to the Circuit Court of Appeals in the matter of the aforesaid petition of said army minority stockholders, and apparently, so far as that court at least was concerned, the petition seemed to have been abandoned. Following this, the present appellees applied to the Supreme Court of the United States for a writ of certiorari; and for the purpose of that application filed their Praecipe for the transcript of record, which Praecipe, among other things, included the petition of these army minority stockholders for leave to intervene, notice of the hearing thereof, order of submission thereof, and the dismissal of said petition as to the above mentioned persons.

Thereafter, and in the Supreme Court of the United States itself, these "army minority stockholders" petitioned for leave to intervene, as petitioners along with Martin and Overton, in petitioning for the writ of certiorari applied for; but on April 25, 1921, *and with the petition of these army minority stockholders before them,* the Supreme Court of the United States denied said petition for said writ of certiorari. In brief, the petition of these minority stockholders—if it was the petition of any minority stockholder aside from Constance Mills Overton—originated in the Circuit Court of Appeals, received similar treatment from that court and the Supreme Court of the United States, and by no means supports the assertion in the appellees' brief that these minority stockholders "*at all times* actively aided in the prosecution of this litigation."

The Motion to Dismiss the Appeal.

The brief under consideration then purports to quote on pages 2 and 3, the motion to dismiss the present appeal. But even here one finds unfortunate misapprehensions of the record. For example, it is stated on page 2 that Section 5 was "adjudicated" to belong to the Presidio Mining Company, but we protest against the ambiguity of this phrase, and the false impression which it creates by ignoring the original and continued expressed willingness and desire on the part of Mr. Noyes to transfer Section 5 to the Presidio Mining Company whenever that company was ready to pay its purchase price and incidental moneys,—a position fully recognized even in the decree of the learned judge of the trial court. So, on page 3, speaking of the views of the learned trial judge which brought about the present appeal, it is stated, quite in conformity with the reiteration of the phrase "taxable costs" throughout the brief under examination, that the learned trial judge took the position that the question of taxation of costs would be determined upon the entry of the final decree; but, as we read his memorandum opinion (page 503, Trans. 3896), nothing whatever was said about "taxation of costs", or "taxable costs", and all that was said was that the ultimate liability for the expense of the receivership might be reserved until that question properly arose.

Appealability.

On page 3, and elsewhere throughout appellees' brief, the claim is made that the order appealed from is not appealable; but we urge that the order complained of is appealable, because final quoad the receivership.

It is submitted that it is not a necessary condition of appealability that a judgment should be final in the sense that it disposes of all possible issues in a cause, but it is enough if the judgment or order determine finally a distinct phase of the pending litigation. This receivership, however, was a phase of this litigation distinct from its general subject,—so distinct indeed that the litigation could well have been carried forward to an ultimate decision, and was in fact so carried forward in the court *a quo,* without any receivership whatever; and the accuracy of this proposition becomes apparent from even the most general consideration of the nature of a receivership. A receiver is merely a ministerial officer; he is not a party in a full sense (*Youtsey v. Hoffman,* 108 Fed. 693); and he has no powers other than those conferred upon him by his order of appointment. He is appointed on behalf of all parties who may establish rights in the cause (*Thom v. Pittard,* 62 Fed. 232), but on behalf of no particular interest (*Pa. Steel Co. v. Ry. Co.,* 198 Fed. 721; *Central Trust Company v. Railway Company,* 59 Id., 523). Although after his appointment neither the owner nor any other party can exercise acts of ownership over the property, yet neither party is responsible for his acts (*Milwaukee, etc. Ry. v. Sutter,* 69 U. S. (2 Wall.) 519). The custody of such an officer is that of the court, but it leaves the rights of the parties concerned to be determined and controlled by the ultimate decree of the court: the appointment does not change the title or rights of possession of the property, but puts it into the receiver's cus-

tody for the benefit of the party ultimately entitled (*Union Bank v Bank of Kansas City,* 136 U. S. 223): no lien on the property is affected by the appointment (*Pa. Steel Co. v. Ry.,* 198 Fed. 721); nor does such an appointment work a dissolution of the corporation, but only suspends the functions of its officers to the extent provided in the order of appointment (*State v. Ry.,* 17 N. E. (Ind.) 909). A receiver has no power without the previous direction of the court to incur any expenses except those absolutely necessary for the preservation and use of the property (*Cowdrey v. Ry. Co.,* 93 U. S. 352); and it is the duty of a receiver appointed by a federal court to manage the property according to the laws of the State wherein the property is situate (Judicial Code Sec. 65). Prior to *Great Western Mining Company v. Harris,* 198 U. S. 561, suits by a receiver in a foreign jurisdiction were sustained, but since the decision was handed down in the case last cited, the rule appears to be that a receiver cannot sue outside the jurisdiction of his appointment, except, perhaps, under special circumstances (*Burnheimer v. Converse,* 206 U. S. 516): nor, prior to the Act of March 3, 1889, could a federal receiver be sued without the consent of the appointing court,—the Act of March 3, 1889, extending, however, to any court of competent jurisdiction, state or federal, and not merely to the appointing court (*McNulta v. Lochridge,* 141 U. S. 327).

It results from the general nature of a receivership, that the receiver, being a mere ministerial agency of the court, can exercise no commanding control over

the litigation itself or over the rights, defenses or legal policies of the parties interested: as suggested by Mr. Justice Wayne, "when appointed, very little discretion is allowed to him", and

> "he has at most a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act" (*Booth v. Clark*, 58 U. S. (17 How.) 322, 330, 338);

as pointed out by Mr. Justice Swayne,

> "he has only such power and authority as are given him by the court, and must not exceed the prescribed limits" (*Davis v. Gray*, 83 U. S. (16 Wall.) 203, 218; *Tibbets v. Cohn*, 116 Cal. 365);

and

> "the authorities are many that where the appointment of a receiver is superseded, it may become his duty to restore that which has come to his hands to the parties from whom it has been withdrawn, and that this may be directed to be done" (*In re McKenzie*, 180 U. S. 536, 551).

So distinct is a receivership from the main body of the litigation, that it may fairly be regarded as a mere ancillary or provisional remedy in those cases in which it may properly be considered (*Vila v. Grand Island Electric Company*, 4 Ann. Cas. 59): such an appointment is merely auxiliary to a pending action (*Hobson v. Pacific States Mercantile Co.*, 5 Cal. App. 94); it is classified by the California Code of Civil Procedure as a "provisional remedy" (Part 2, Title 7):

> "the authority conferred upon the Court to make the appointment necessarily presupposes that an action is pending before it, instituted by someone authorized by

> law to commence it'' (Hobson v. Pac. States Mer. Co., 5 Cal. App. 94, 101);

and so distinct indeed from a receivership are the merits of the controversy itself that it has even been held that upon an application for the appointment of a receiver the merits will not be inquired into (*Sheldon v. Weeks,* 2 Barb. 532; *Contro v. Gray,* 4 How. Pr. 166; *Higgins v. Bailey,* 7 Rob. 613).

It may be added that a litigant is under no compulsion to apply for a receiver, nor is the chancellor obliged to appoint one merely because an application has been made therefor; and as suggested in our former briefs in dealing with this subject matter, authority of the most respectable character supports the proposition that where an injunction will sufficiently serve the purpose, a receiver will not be appointed (See also, *Fischer v. Sup. Ct.,* 110 Cal. 129, 138: *Tibbets v. Cohen,* 116 Id. 365, 369; *Hobson v. P. G. Merc. Co.,* S. C. A. 94, 101-2). Provision has always been made for an appeal from a decree of a chancellor determining the main body of the litigation and settling therein the fundamental rights of the respective parties: but though this provision was made with reference to the main body of the litigation, yet, at one time, no appeal was permitted from the action of the chancellor in appointing a receiver; and it was only by the legislation now incorporated in the Judicial Code that an appeal to the Circuit Court of Appeals lies from an interlocutory decree appointing a receiver. To sum it all up, a receivership is not inevitable in an equity suit: it is granted or denied in particular cases as the

proper application of proper principles to proper facts may, in the exercise of a sound judicial discretion, suggest to a chancellor that such a drastic step should or should not be taken; the appointment of a receiver is often a debatable feature in a cause wherein other features are conceded: in very many cases, general relief has been allowed, but a receivership denied; and where an appointment has been made, the receivership has its own origin, its own activity, its own termination—it is purely adjective and a feature apart from the main case.

This proposition that a receivership is a feature of litigation quite apart and distinct from the main case in the course of which a receiver is appointed, could have no better illustration, we think, than the history of the receivership in the case at bar. To no extent and in no degree was that receivership interwoven with the issues framed by the bill and answer: it was not even in existence during the hearing and determination of those issues; and it had no existence whatever until after those issues had been determined by the learned judge of the trial court. In a word, the main case was heard and determined wholly independently of any receivership whatever.

If the foregoing suggestions are sound, and we believe that they are, it must be plain that the order appealed from was final as to the receivership phase of this litigation: it wound up that receivership: it discharged the receiver: it exonerated his bondsmen: it undertook, against the protests of these appellants, to dispose of money of the company which was re-

tained by the receiver when he made delivery to the company of the remainder of its property pursuant to the decree of this court, after the writ of certiorari had been denied by the Supreme Court; the order appealed from closed that chapter of this long history which was concerned with this receivership; and such a final order, we submit, is an appealable order. We submit that a decree is final which completely determines an ancillary matter distinct from the general subject of litigation.

Hill v. Chicago Ry., 140 U. S. 54;
Stewart v. Masterson, 131 Id. 159;
Potter v. Beale, 50 Fed. 860;
Standley v. Roberts, 59 Id. 839, 840;
Rust v. United Water Works Co., 70 Id. 132;
Tuttle v. Claflin, 88 Ill. 122;
Edgell v. Felder, 99 Id. 324;
Sanders v. Bluefield Water Works Co., 106 Id. 587;
Eau Claire v. Payson, 107 Id. 552;
Kemp v. National Bank, 109 Id. 48;
Hooven Co. v. John Featherstone Sons, 111 Id. 81;
In re Michigan Cent. Ry., 124 Fed. 727, 733.

Let us, however, examine this question from a different point of view. The fourth and final account of the receiver prayed

> "that said report and account be approved and that the fees of himself and his attorney since the 31st day of December, 1920, as such receiver, and for closing the affairs of said trust as appears by this report, be fixed by the court and ordered paid from the balance of said funds now in his hands" (Trans. of Records No. 3896, p. 335);

and in response the order appealed from was made, wherein and whereby

> "said balance now remaining in the hands of said receiver be divided between the said receiver and his counsel" (Trans. No. 3896, p. 506),

and wherein and whereby said balance was equally divided between the receiver and his counsel, and wherein and whereby it was further ordered "that said " receiver be and he is hereby discharged and bondsmen " exonerated". Such being the application of the receiver, and such the order made pursuant to that application, let us, for the purpose of testing the appealability of the order in question, assume that the order, instead of making any award to the receiver and his counsel, discharging the receiver and exonerating his sureties, should have denied the prayer of the receiver's application, should have made him no award whatever, and should have refused to discharge him or exonerate his sureties: in such an event, could the receiver have appealed from such an order? And if he could have appealed from such an order as we have supposed, upon what principle, consistent with equality as applied to the interpretation of the law, should the present appellants be denied a right accorded the receiver? If, in the interpretation of the law relative to appeals from orders winding up receiverships, the receiver be allowed an appeal from an adverse order dealing with his charges against the fund, how in fairness may a similar right be denied those who seek to prevent the reduction of the estate by the allowance of charges which the objectors consider illegal? But we submit that had the present order been adverse to the receiver,

he could have appealed from it: this view necessitates and presupposes the appealability of the order: why, then, where, against objection and exception, the order is favorable to the receiver, should not the opposing parties have the correspondent right? To illustrate our meaning: in the progress of a suit for the foreclosure of a mortgage, one Hinckley was appointed receiver and under the final decree the mortgaged property was sold and subsequently conveyed to the purchasers. Upon a settlement of the accounts of the receiver a balance was found due from him of a considerable sum of money, for which a decree was entered directing its payment into court on or before a fixed date, and thereupon the receiver prayed an appeal "*from the decree against him*", which was granted. Thereupon, the complainants in the action moved to dismiss his appeal on the ground that he was not a party to the suit, but the motion to dismiss was denied, Waite, C. J., remarking:

> "This seems to us to be decisive of this motion. The receiver cannot and does not attempt to appeal from the decree of foreclosure, or from any order or decree of the court, except such as relates to the settlement of his accounts. To that extent he has been subjected to the jurisdiction of the court, and made liable to its orders and decrees. He has, therefore, the corresponding right to contend against all claims made against him. For this purpose he occupies the position of a party to the suit, although an officer of the court, and after the final decree below has the right to his appeal here. In this case, the final decree has been given, and the case is properly here upon the appeal as prayed and allowed. This will not keep anything in litigation but the receiver's accounts. The title to the property and the possession under the sale cannot be in any manner affected. Everything can

> be closed up in the court below, in accordance with the decree which has been entered in the cause, except the distribution of the money claimed from the receiver."
>
> *Hinckley v. Gillman, etc. Ry.,* 94 U. S. 467, 469.

The attitude here revealed suggests something more than the right of a receiver to appeal from an adverse decree,—a right which we contend carries with it a correspondent right in those who resist the claims of a receiver. The view of Mr. Chief Justice Waite presupposes a marked distinction between the main body of the litigation, involving the title to the property and the possession under the sale, upon the one side, and the receiver's accounts upon the other side: in other words, we have here, again, a recognition of the proposition that a receivership is a phase of litigation quite separable and distinct from the general subject of the litigation. So, in *Hovey v. McDonald,* 109 U. S. 150, a case cited in the brief filed herein by the attorney for the present receiver (page 1). In that case, one was entitled to a fund in the hands of an agent of Great Britain, and his assignee in bankruptcy filed a bill against the claimant and a third person who claimed the fund as a purchaser, to restrain them from collecting the money: after a restraining order had been issued in the cause, a preliminary injunction was issued, and a receiver of the fund was appointed. Meanwhile, another person commenced suit in the same court against the claimant of the fund and the purchaser of the fund, claiming one-fourth of the fund, and obtained a preliminary injunction restraining them from collecting more than three-fourths. Subsequently, an order

was made in the suit of the assignee in bankruptcy in which after reciting that it was made by consent of the parties in both suits, both restraining orders were vacated, payment of one-half of the fund was ordered to the one who claimed the fund as purchaser discharged of the claims of the plaintiffs in either suit, and the other half was ordered to the receiver who was directed to hold it subject to the claims of the assignee in bankruptcy and of the plaintiff in the second action—the claimant of one-fourth of the fund. This decree was carried out. Both of these bills were demurred to, and in each suit a decree of dismissal was entered at special term on the demurrer. In the suit of the assignee in bankruptcy an appeal was taken and the decree was affirmed. In the suit of the claimant of the one-fourth of the fund the decree of dismissal was entered on June 24, 1875, and an appeal was taken on the same day. On the 28th of the same month, the decree was amended by adding an order that the receiver pay the fund to the person who had claimed it as purchaser—the same person who was co-defendant in the action of the assignee in bankruptcy, and notice thereof was at once given to the receiver with a demand of payment. The receiver asked the court what he should do and the court directed him to obey the decree, whereupon he surrendered the fund to the person who claimed it as purchaser. The appeal of the plaintiff in the second action was perfected on July 12th, by filing an appeal bond, the judgment was reversed on appeal, and an order was entered that the receiver should pay the money into court. Failing to do this he was adjudged

in contempt and an order issued for an accounting. An auditor took testimony and returned it with a report that the receiver had done his duty by paying the money to the person who claimed it as purchaser, pursuant to the amendment to the decree made on June 28, 1875. When this report was confirmed, an appeal was taken from that decree by those who had claimed the one-fourth of the fund. The receiver moved to dismiss the appeal, on the ground that he was not a party to the suit, but the Supreme Court held that although he was not a party to the suit, yet he was the principal party to a side issue which had arisen in it, which was appealable, and that the judgment upon it was final, and the appeal was properly taken. In this connection, it will be noted that while in *Hinckley v. Gillman, etc. Ry.,* supra, it was the receiver who appealed from what he regarded as an adverse order affecting the receivership, yet, upon the other hand, in *Hovey v. McDonald,* the appeal by those in opposition to the receiver, taken by them from what they regarded as an adverse order affecting the receivership, was sustained, and the attempt to dismiss that appeal failed to succeed: in other words, in the first of these cases it was the receiver who appealed from an adverse order affecting the receivership, but in the latter of these two cases it was a party litigant, other than the receiver, who appealed from an adverse order affecting the receivership; and reading together these two cases, comparing and contrasting them, full support is found, we believe, for our view that to grant the right of appeal to the receiver, but to deny the correspondent right to those who entertained views

antagonistic to those of the receiver, would be to put upon the law an interpretation not consonant with fair play or equality. And in the course of the opinion in the case last cited, the Supreme Court, through Mr. Justice Bradley, took occasion to say:

> "The first matter to be determined is the motion on the part of the receiver to dismiss the appeal for the reason that he was not a party to the suit. This motion cannot prevail. The proceedings instituted by the order requiring the receiver to file his account, and the subsequent reference of that account to an auditor, and the exceptions thereto, were all directed against the receiver for the purpose of rendering him personally responsible for the fund which had been placed in his hands, and which he had delivered over in obedience to the original decree. It was a side issue in the cause, in which the complainants on the one side, and the receiver on the other, were real and interested parties. *The decree confirming the auditor's report was, as to this matter, a final decree against the complainants and in favor of the receiver.* We have so often considered cases of this sort, arising incidentally in a cause, but presenting independent issues to be determined between the parties to them, that it is unnecessary to enter into a detailed discussion of the subject at this time. The receiver, though not a party in the principal suit, was an officer of the court appointed in the suit, and was a principal party to the particular question raised by the proceedings referred to. It is only necessary to refer to some of the cases that apply to the subject. It will be found fully discussed in Blossom v. Milwaukee Railroad Company, 1 Wall. 655; Butterfield v. Usher, 91 U. S. 246; Trustees v. Greenough, 105 U. S. 527; and Hinckley v. Gilman, Clinton and Springfield Railroad Company, 94 U. S. 467. In the case last cited a decree was rendered against a receiver, directing him to pay into court a certain sum of money, being the balance found due from him on the settlement of his accounts. He appealed from this decree, and his right to appeal was sustained by this court. This case is a direct authority to show that the receiver in the present case, had the

> decree been against him, could have taken an appeal; *and, if he would have had a right to appeal, surely the opposite parties have the same right.*"
>
> *Hovey v. McDonald,* 109 U. S. 150, 155-6.

There seems, therefore, to be no reasonable doubt concerning the right of appeal from a decree or order winding up a receivership. And in this connection we venture to recommend for analysis the case of *Bosworth v. Terminal Railroad Association,* 174 U. S. 182, merely remarking by the way an error in the third paragraph of the syllabus wherein the reporter speaks of "the "rights of *both* parties to the suit", notwithstanding that the language of the opinion proper is "the rights "of *either* party to the suit"; but, as aptly remarked in *Hovey v. McDonald,* "if he (the receiver) would "have the right to appeal, surely the opposite parties "would have the same right" (page 156). And in this connection it may be added that our contention that the receivership and its associated business are distinct from the general subject of the litigation—a general subject covered fully and circumstantially in the previous opinions of this court,—are as distinct as the intervention in *Gumbel v. Pitkin,* 113 U. S. 545, or in *Trust Company v. Grant Locomotive Works,* 135 Id. 207, 224-5, is further emphasized by the proposition that while a receiver has no right of appeal from orders which do not affect him personally, or which determine the rights of creditors or claimants *inter sese,* yet where a claim is asserted which involved an increase or diminution of the estate of which he is the receiver, or where an order does affect him personally, he may appeal: but

once concede to him a right of appeal, and such concession necessarily presupposes not only finality upon a matter distinct from the general subject of the litigation, but also the corresponding right in the other party or parties.

Final Decree in Main Case Unnecessary.

We urge, further, that the order now appealed from, being final quoad the receivership, the present appeal is timely, and these appellants were not required to await the entry of a final decree in the main case in which this terminated receivership was an incident or episode.

This proposition, we believe, necessarily results from the proposition that the order appealed from terminated and wound up a phase of this litigation distinct and apart from the main case, not necessary to the main case, and injected therein for the benefit of complainants already fully protected by the injunctive process of the court, and after the issues in the main case had been fully heard and determined.

The Supreme Court of Montana points out that the lower court is not precluded

> "upon a discharge of the receiver *before the conclusion of the action,* as was the case here, from fixing his compensation, and adjudging the payment thereof against the party at whose instance he was wrongfully appointed" (*State v. District Court, 72* Pac. (Mont.) 713).

In *Rochat v. Gee,* it was conceded by the court that

> "a party aggrieved by an order of the court made before judgment allowing the final account of a receiver, may appeal *without waiting for a final judgment in the case*" (91 Cal. 357).

And in *Grant v. Superior Court,* 106 Cal. 324, the court said:

> "The only order which the court proposes to make is one fixing the amount of the compensation. Such an order cannot, by itself, injure anyone; but, if in addition to the order fixing the amount, the court should order it paid out of the fund in the receiver's hands, such order, under whatever name it might be designated, would be a final judgment upon a collateral matter arising out of the action, and would be appealable by any party interested in the fund (Trustees v. Greenough, 105 U. S. 527; Tompson v. Huron Lumber Co., 5 Wash. 527). Or, if the court should order either the original or substituted plaintiff to pay the compensation allowed, that would be a final judgment from which an appeal would lie. If this order should not be appealable by reason of its amount being insufficient to confer appellate jurisdiction upon this court, it could be reviewed either upon certiorari or upon an appeal from the order settling the receiver's account; and any attempt to enforce its payment by suit could be defended upon the want of jurisdiction in the court to make the order. There is nothing in conflict with this view in anything decided in Rochat v. Gee, 91 Cal. 355. The order held in that case to be nonappealable was merely a partial settlement of a receiver's account, and was not by its terms made payable by any party, or enforceable against any party by execution, or payable out of any fund. In other words, it lacked one essential element of a final judgment. *And it was conceded in that case that there might be an appeal by a party aggrieved from an order allowing the final account of a receiver before a final judgment in the action as between the original parties.*"
>
> *Grant v. Superior Court,* 106 Cal. 324, 325-6.

Present Appeal Not Premature.

It is then claimed in the brief filed herein for the appellees, though apparently not in that filed herein for the receiver, that the present appeal is premature for the reason that "the question of taxation of costs "is within the jurisdiction of the trial court in the

"first instance": but we respectfully insist that neither the compensation of a receiver, nor his attorney's fees, can properly be described as "taxable costs". If we understand our opponents correctly, their contention seems to be that this subject matter of taxable costs can be disposed of only by a final decree, but our opponents are singularly reticent as to their conception of a final decree—although they use the phrase "final decree" with great frequency, yet they omit to advise us as to whether they mean by that phrase a final decree upon the merits of the main case, or a final decree in the matter of the receivership episode. Our views, however, as to the finality and appealability of the order now complained of have already been stated, and need not be repeated in this place.

Taxable costs."

But in this connection another striking reticence of appellees should be brought to the attention of the court. If there be a phrase which appellees have worn threadbare throughout their brief, it is the phrase "taxable costs", but the reticence of which we complain rests is this, that from the beginning of their brief to the end thereof no real light is shed by them upon the meaning of this phrase. We are unable to discover what the appellees have in mind by the use of this phrase: nowhere do they attempt anything like an examination of the meaning of the phrase; and still less do they attempt any definition thereof. In the course of their brief appellees speak of what they call "false issues advanced by appellants" (page 16), and at page 6, they speak of stripping appellants' object of its cloak, but we think that, instead of indulg-

ing in this sort of phraseology, had the appellees taken the trouble to define, with something approaching adequate precision, the meaning of the phrase "taxable costs", their brief would have been much more assistance upon this appeal than we can conscientiously concede it to be.

We understand that

> "costs are those expenses incurred by parties in prosecuting or defending suits or proceedings at law or in equity and which are recognized and allowed by law" (5 Ency. Pl. and Pr. 106):

they are statutory allowances reimbursing a party for expenses incurred in prosecuting or defending an action; and they have reference to the expenses of litigation as between the parties (*Williams v. Flowers,* 7 So. (Ala.) 439; *Bohart v. Anderson,* 103 Pac. (Okla.) 742). It is common ground that prior to the statute of Gloucester (6 Edward I), costs were unknown: they have been and they are purely statutory, and cannot be imposed or recovered except where authorized by statute (*Tesla Electric Co. v. Scott,* 101 Fed. 524; *O'Neil v. Kansas City Ry.,* 31 Id. 663); and statutes regulating costs seem to be considered as penal in their nature, and to be strictly construed (5 Ency. Pl. & Pr. 111; 11 Cyc. 27; 7 R. C. L. 782). State statutes regulating costs are not binding in the federal courts (*O'Neil v. Kansas Ry.* supra), and while, prior to the Act of February 26, 1853, taxation of costs in the various districts conformed to the practice of the State in which the District was situated, yet since the enactment of that statute, this rule applies only with respect to items of costs not specially covered by

the enactment (*Primrose v. Fenno,* 113 Fed. 375). It is a rule of almost universal application that the prevailing party is entitled to costs: but in this connection it is proper, we think, to point out that while in courts of equity the allowance of costs is within the court's discretion, yet the general rule in suits in equity, as well as in actions at law, is that the prevailing party is entitled to costs (*Warren v. Burnham,* 32 Fed. 579; *Hovey v. Stephens,* 12 Fed. Cas. No. 6746; *Hunter v. Marlboro,* Id. No. 6908); and in exercising this discretion, this rule will be applied unless the losing party can show that equity requires a different judgment (*Clark v. Reed,* 28 Mass. (11 Pick.), 446). Here, however, a related inquiry becomes pertinent. If costs are to go to the prevailing party, who is the prevailing party, and as to what should he prevail? In this connection it will be observed that what are here claimed to be "taxable costs" are not such in the sense of any accepted definition of that phrase, but include simply the compensation of a receiver, and his attorneys' fees,—in other words, expenditures claimed to have accrued in the course of the separable and unnecessary "side issue" (*Hovey v. McDonald,* 109 U. S. 150), which "side issue" has terminated in its own final decree, and as to which final decree the appellants were the successful parties. The "taxable costs" now in contestation are not by any means those of the action at large; they are those only of a severable branch of that action; and as to that branch, these appellants prevailed, this appellate court sustaining them and ousting the appellees' re-

ceiver. No other or different expenditures are here involved save and except those associated with this receivership (*Kell v. Trenchard,* 146 Fed. 245); and if the rule be applied, as we think it should be applied, that the prevailing party is entitled to costs as against the losing party, it would seem to follow that a reversal should here be ordered.

It is often said that a complainant who brings a groundless suit, or makes a groundless application, or prosecutes useless litigation, will be required to pay costs (11 Cyc. 35): but if this be so, upon what equitable principle are costs, whether "taxable costs", or otherwise, to be charged against those who defeat the groundless proceeding in which the "costs" were incurred, or as to which the "costs" are demanded? So far as this receivership is concerned, he who instigated it must have known that he was not properly entitled thereto, especially since the first opinion in this cause was handed down; and since he was defeated, no equitable reason exists why those who defeated him and those associated with him in the receivership, should be called upon to pay the expense now claimed under the guise of "taxable costs" (compare *Howard v. Bennett,* 72 Ill. 297). And so, too, with the unnecessarily expensive receivership itself: that was provoked by the complainants: in its overturning, the present appellants were the prevailing parties: why, then, should they be charged with the present expenditures (compare *Outtrin v. Graves,* 1 Barb. Chanc. 49; *White v. Meday,* 2 Ed's Chanc. 486; *Blassengame v. Boyd,* 178 Fed. 1). To summarize this special aspect of the

matter, it may be said that the awarding of costs in equity cases rests in the sound discretion of the court, but this does not mean that such discretion may be exercised arbitrarily or capriciously, or that the decision of the court will not be subject to revision on appeal. The statement simply means that the disposition of costs is not, as in cases at law, predetermined by fixed rules, but in every case the court will take into consideration all of the circumstances, and grant costs as justice seems to dictate: but in this connection, in the exercise of this discretion, it is held to be desirable to depart as little as possible from the rules of law on this subject, the principal one of which is that the prevailing party is entitled to costs, but not the defeated party.

In our opening brief herein, we made some observations concerning jurisdiction, in the course of which we contended that it was an essential ingredient in the conception of jurisdiction that the action of the lower court should accord with the established procedure governing the class in which the case in hand belonged: while we did not dispute that the lower court had authority in a proper case to appoint a receiver, yet we contended that no authority existed to appoint a receiver unless the proper case was presented to justify such appointment (compare *Maxwell v. McDaniels,* 184 Fed. 311; *Elliott v. Superior Court,* 168 Cal. 727): but if our views in this connection be sound, they naturally suggest a reference to the rule of "no juris-" diction, no costs" (*Citizens' Bank v. Cannon,* 164 U. S. 319), the decisions in support of this rule pro-

ceeding upon the ground that the court has no jurisdiction to award costs any more than it has to award any other relief, where the case is not legally before the court (*Pentlarge v. Kirby,* 20 Fed. 898).

Summarizing this branch of the matter we respectfully insist that the items allowable as costs or, to use appellees' reiterated but undefined phrase "taxable "costs", may include fees of the regular and ordinary officers of court, charges for the service of papers, fees of jurors, trial fees, calendar fees, moneys expended for copies of papers, witness fees, affidavits, depositions, stenographers' fees, and matters of that kind; and even if we were to concede that this receivership actually did bring any fund into court, it would still be the settled rule that such a fund could not be charged with the payment of the fees of a special and limited court officer, like a receiver, or the fees of his counsel (*Hauenstein v. Lynham,* 100 U. S. 483, 491). On the other hand, the compensation of a receiver and his counsel is not treated as costs, or taxable costs, in any statute of the United States or of the State of California with which we are familiar, the subject of costs as regulated by Federal Statutes being found in 2 Fed. Stats. Ann. Second Ed., 624, *et seq.,* while the statutes of the State of California dealing with this subject matter will be found commencing with Section 1021, of the Code of Civil Procedure. Upon the whole, therefore, we insist with great respect that the items involved in this appeal are neither costs nor taxable costs, and that, if they are, they are not to be charged against the prevailing party upon the issue as to the receivership.

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On pages 4 and 5 reference is made to the absence of criticism of the mere figures in the receiver's account it being conceded by the way that if objection had been made to the correctness of any of the receiver's items an appeal might lie from the order of the trial court; and it is claimed that "we are reduced to the "question as to whether or not this is a taxation of "costs". It seems then to be conceded that if the mere arithmetic of the matter were involved an appeal would be proper: but if the legal principles controlling that arithmetic be involved, an appeal would be improper: have we not here a pyramid standing upon its apex? And if it be assumed that the only question is one as to the taxation of costs why is it that the inquiry whether this is or is not a proceeding to tax costs has not been analyzed? *Butler v. Fairweather,* 91 Fed. 458, is then cited with reference to "the appealability of an order "such as this": but so far as we are able to see, that authority is one which is really for these appellants and against the appellees. The case was decided on January 5, 1899: it was a contempt case growing out of the refusal of a witness to answer certain questions as to the contents of a codicil, on the ground that he was an attorney. The claim was made that the order committing the recalcitrant witness could be reviewed only on an appeal from the final decree in the cause in which the order was made: but it was held that this committing order proceeded "upon the matter distinct "from the general subject of the litigation"; and so, likewise, in the matter at bar, we respectfully insist that this receivership was "a matter distinct from the

"general subject of the litigation". The intimation on page 5 that the present appeal is an attempt to coerce the trial court to enter a certain kind of decree is, we think, an unreasonable statement, because there is never any improper coercion in compelling equitable action,—that is done in every equity suit in which a reversal is ordered. Nor is it at all material what may be appellees' "belief" that there is no such final order in the instant suit from which an appeal lies (page 5, also): the finality of the order in the instant suit is not to be determined, we think, by anybody's belief, but by the nature and character of the order itself. On page six it is stated that "as to who should ultimately pay "this expenditure was reserved for decision on entry "of the final decree": but if this be so, it would seem that the real issue is one of liability and not of arithmetic, and that the principles establishing such liability should have been determined at the time, no good reason appearing why their decision should be delayed.

The "Real Issues."

The appellees then proceed, on page 7, to discuss what they call the "real issues presented by this ap- "peal"; and in opening that discussion seem to forecast the denial of their own motion to dismiss. They then declare in three separate sentences that the appellants' opening brief fails to deal with the real issues presented by the appeal, and contend that if the appellants should prevail upon this appeal, this court would have to enter a decree, not only vacating the order of the lower court, but also requiring that court to exercise its discretion in respect to "*one element* of the costs" in a particular manner. We do not think, however,

that this conclusion follows. We are unable to see why upon this appeal, which involves but "one element" of the case below, and that, too, a separate element with an identity of its own and quite apart from the general subject matter of the main case, the principles by which discretion should be governed cannot be laid down by this court; and certainly no adequate reason has been advanced by the appellees to support the contrary; and we think that while it is one thing to coerce the discretion of the lower court in a particular manner, it is quite another thing to state the general principles applicable to a topic, to the end that in dealing with such topic the lower court may be guided by those principles. In a word, we believe that the rules of law which determine ultimate liability for receivership expenditures, are essentially distinct from the arithmetic of the taxation of costs. What importance, then, is there in the suggestion of the appellees that the arithmetic of the receiver is uncriticised? We are not here concerned with his arithmetic, or chaffering as to whether he should have expended this amount or that amount for any particular purpose: but we are here to determine the question of ultimate liability for those expenditures, whatever their amount may be. These appellants consistently rebelled against submission to this expensively superfluous receivership: the directorate of the company were compelled to submit to ouster from their authority, and to endure that expulsion until they finally recovered what was already justly their own: they see no reason why they should return thanks for being wronged, or why they should ask pardon

for being in the right: but when they appeal to the gross inequity of compelling this company to pay out of its own treasury for the wrong done it by an unauthorized invasion of its property rights by this receiver, the grotesque answer seems to be that it is not questioned that the receiver expended so many particular dollars and so many particular cents for this, that or the other piece of machinery.

The only possible sense in which the expression "conceded ly proper and reasonable allowances for receivership compensation and costs", at the top of page 10 of the appellees' brief, can be considered, is that the receiver in purchasing or repairing this, that or the other mining machinery did not expend for that purpose an unreasonable amount: but to say that those allowances were conceded to be proper to be taken out of the treasury of this company is to say something which has never been conceded by the appellants throughout the length and breadth of this case. Nor do we understand the propriety of the claim that a receiver should not be required to undergo the delay or risk incident to an order requiring him to look for compensation and expenses to the party at whose instigation he was appointed: the authorities dealing with receivers very generally show that orders of this kind are made with great frequency in receivership cases: as we have already hinted in our opening brief, no obligation rests upon any particular person to undertake a receivership, but if one does undertake the task, he does it knowingly and in view of the settled doctrines of the law governing such an activity; and, again,

we say, that we are wholly unable to perceive either the equity or the ethics of my putting my hand into your pocket to compel you to pay me for a wrong which I have done you. Nor do we perceive the propriety of the additional suggestion on page 10 of delaying the determination of matters incident to a receivership itself terminated, until the signing of the final decree in the main case: we have already adverted to this topic: we see no good reason why two bites should be made of this cherry; and we have looked in vain for any respectable authority which justifies piecemeal dealing in a matter of this kind,—or indeed in any other matter wherein for the peace and best interests of society an end should be put to litigation already interminable. In the nature of things, the receivership itself being a terminated episode, no good reason can be advanced why matters connected therewith should not themselves promptly be terminated. There is here no such "piecemeal taxation of costs" as is intimated on page 11 of this brief: the general costs of the litigation at large, are one thing, but the principles by which we are to determine liability for the expenditures of a terminated phase of the litigation, are quite another thing, altogether; and here, again, we encounter the familiar fallacy which obscures the general costs of the main litigation upon the one side, with the ultimate liability for expenditures of a closed phase, upon the other. When it is said on page 11 that this appeal should be determined in the light of the "very simple " and well established principle" of the initial discretion in respect to the taxation of costs which is vested

in the trial court, what taxation of costs is referred to? Do the appellants mean the costs of the main case, or the expeditures of an independent and terminated branch—an episode and "side issue" (*Hovey v. McDonald,* 109 U. S. 150), not necessary to the main case, and without which the main case could just as well have proceeded, and actually did proceed, to a decision? And why assume that we wish this court to tax costs? We are asking this court to do what the lower court should have done, viz., formulate the principles by which ultimate liability for the expenditures of this unnecessary receivership should be determined. And could any thing be more unreasonable than the constant repetition of the "first instance" fallacy? We are not here dealing with any "first instance" function: the receivership was terminated: after having been persistently resisted from the beginning, it received its quietus at the hands of this court with certiorari denied by the highest court of all; and thus, upon every principle which makes for the termination of litigation, what we are seeking to have determined is the principle according to which ultimate liability for the receivership expenditures shall be fixed. We are not dealing with what is called on page 12 of appellees' brief, a " purely temporary provision for his (the receiver's) " compensation and expenses": we are not looking forward to any continuance of this receivership such as would be implied by the thought of a "temporary " provision": what we are here dealing with is the end of the receivership and the business incident to that, and the real liability for the expense of its administration.

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Toward the lower part of page 12, we notice a reference to the alleged benefit resulting to the company from the receivership,—a claim which has not been without repetition by the appellees, but as to which our views have already been briefly stated in our opening brief. We have never disputed the physical fact that during the period of time embraced by the receivership a considerable amount of money came in to the company's treasury, but we have always insisted that no evidence is producible to establish that any profit was in any degree attributable to the receivership, and that the evidence was to the contrary. This topic has been considerably discussed throughout the prior history of this case in this court, and it does not, therefore, seem necessary in this place to do more than to add that during the year 1915, which was the last year of the appellants' management of which there is any evidence in the record, the price of silver was well under fifty cents per ounce (Trans. No. 3253, pages 714-6); that the selling price of silver during the year 1918, from month to month is set forth on page 214 of the present record, that being the only occasion upon which the receiver states the fact in plain figures; and that on April 23, 1918 (Fed. Stats. Ann., 1918 Supplement), about 60 days after the receiver was appointed, the Pittman Act passed the Congress and fixed the price of silver at $1.00 per ounce. It was and is common knowledge that during the years 1918-1920, there was a phenomenally high price for the commodity which the company produced for sale; and it is not an unreasonable statement to make, based upon all of the dis-

closures touching this subject matter, that the increase in the company's cash during the years 1918-1920, is to be attributed to the rise of this selling price and not to any other cause whatsoever; and that the cash resources of the company increased, not because of this receivership, but in spite of it.

Equitable Discretion and the Equities of the Parties.

At the bottom of page 14 of the brief under consideration, a quotation is made from 23 R. C. L., page 106, substantially to the effect that in fixing the ultimate liability for receivership expenses, courts will be governed by an equitable discretion: but on page 23 of the same brief, it is submitted that because the court deferred all questions as to the "taxation of costs" until entry of the final decree, therefore all consideration of the matter of superior equities, as bearing upon the question of "taxation of costs", "become purely aca- " demic and moot"; but we do not understand why, if the ambiguous phrase "taxation of costs" be synonymous with the determination of the real liability for the expense of an opposed and discarded receivership, the consideration of the matter of equities should be purely academic and moot. We think, as we have already suggested, that the expression "taxation of costs" has a well defined legal meaning, which does not include within its scope the ascertainment and application of the principles whereby a liability for the expense of a rejected receivership should be measured, nor do we believe that in the familiar process of taxing costs equitable discretion has any play, the court in such a matter being constrained by the provisions of the relevant statute which as we have seen must be strictly

construed. On the other hand, when we are seeking to determine upon whom should rest the liability for the expense and loss occasioned by an unnecessary, improper and finally rejected receivership, equitable discretion, and the consideration of superior equities, and especially adjudged superior equities, furnish the test whereby that liability is to be determined; and this appears to be the view of at least one of the present solicitors for the appellees, as may be attested by the following passage excerpted from a brief filed by him in this matter in the lower court:

> "Upon careful consideration, under the principles of law applicable to federal equity suits, we believe we are sustained in our position that in Federal Courts the appointment of receivers is within the sound discretion of the Court; that if jurisdiction of the parties and subject matter is obtained, *and the facts warrant the appointment of a receiver at the time of the appointment*, the receivership costs and expenses incurred by him as an officer of the Court should be paid out of the fund or property in his hands; that the Court likewise has large discretion in determining who shall pay the costs out of the receivership, and according to the justice and equity of each case it may assess the costs of the receivership against the fund, against the applicant, or against the parties";

citing authorities which have reappeared in the brief filed in this court.

In other words, the quotation from 23 R. C. L. 106, at the bottom of page 14 of the appellees brief is not only at war with the attitude exhibited on page 23 thereof, but it is really a concession that something more is here involved than a mere arithmetical computation: that quotation, as echoed in the brief in the court below just quoted from, concedes that the relevant

equitable principles are to be ascertained and applied; but to say that in this judicial process the equities of the parties "become purely academic and moot", is not only to exhibit an amazing deficiency in legal vision, but it is a very thorough-paced volte-face from the position taken below as exhibited in the passage just quoted. And in this connection, while on this topic, after telling us on page 23 as to what these appellees are "disposed" to do, we are then on page 29 advised that the doing of what they were "disposed" to do is "altogether superfluous". If "altogether superfluous", why then dignify it even by an abortive, quite inadequate and wholly unconvincing attempt at the dissection of the "unthinkable" (p. 23)? And just here, note the "unthinkable" distinction attempted at pages 28-9: the order appealed from quite distinctly conveys to the mind a very vivid conception of how the "receivership " costs" were "temporarily (whatever that may mean) " provided for out of the fund": if this order does not mean that the moneys therein mentioned are not to be taken from the company and handed over to the dethroned receiver, then for us at least plain English speech has ceased to retain intelligent meaning. But note, too, that these moneys are now, at last, spoken of as "receivership costs" (page 28),—an admission incapable of reconciliation with the general pose of our opponents. No successful contention can, we believe, be made that the order appealed from did not terminate the receivership and end that phase of the case in the lower court; the receivership was wound up; no judicial power or discretion, equitable or otherwise, remained

which could operate on the receiver, because if there were, the receivership would not have been terminated, the receiver would not have been discharged, his sureties would not have been exonerated; and therefore so far as this receivership is concerned, the order appealed from has in all its parts the quality of finality. Thus are met even the most extreme assertions of the appellees; and in cases of this class, no question has ever been made as to the right to complain by appeal. See, *inter alia*:

In re Michigan Ry., 124 Fed. 727;
Kell v. Trenchard, 146 Id. 245;
Corn. Co. v. Chicago Co., 185 Id. 63;
Snyder v. McCarthy, 197 Id. 166;
Motion Picture Co. v. Steiner, 201 Id. 63.

"False issues" and inconsistency.

While discussing what appellees claim to be "false "issues", and after pointing out that we have objected to the jurisdiction, it is then observed that "it is next "inconsistently asserted that even if the court had jur- "isdiction to make the order, a recognition of the "superior equities would require the taxation of re- "ceivership costs against complainants": but where is the "inconsistency" here? Has it, for example, ever been adjudged that because I deny that I have been guilty of negligence, I may not also defend upon the further ground that, *even if I were*, the plaintiff's contributory negligence precludes any recovery by him? This is but a simple illustration of a fair and recognized method of argumentation in daily use, examples of which may be found in various forms and in various branches of the law in adjudged cases whose name is

legion (*cf. Todd Co. v. New Era Co.*, 236 Fed. 768; *Am. Nat. Bk. v. Donnellan,* 170 Cal. 9). And strange to say, in the very brief in which this imputation of "inconsistency" is made, we find a corresponding "inconsistency" of which these appellees themselves have been guilty: they claim that this appeal should be dismissed, because not an appealable judgment, and because prematurely taken, and yet they "inconsistently" assert that even if the appeal was properly taken, still a recognition by this court of what appellees consider to be sound legal principles would require the affirmance of the order appealed from; and in view of this attitude on the part of these appellees, we think that this accusation of "inconsistency" may be dismissed from further consideration.

Separability of Receivership.

On page 17, the appellees are constrained to admit a distinction between the exercise of discretion as to the taxation of receivership costs, and the exercise of discretion generally in the case: why this distinction? Have we not here an unwitting admission of the separability of this entire receivership episode? Is there not here a concession of what we have hitherto contended for, viz.: the independent identity of the receivership and its standing apart from the case generally?

Jurisdiction.

Some observations are then made by the appellees with reference to the subject matter of jurisdiction, but beyond citing the Arredondo case from the memorandum opinion of the learned judge below, no reference is made to any well considered case, except that indirectly a passing reference is made to the Wear case on page 21. The definition of jurisdiction as the "power to hear

"and determine" sins by omission, and the Arredondo case itself confirms this criticism. According to the quotation on page 17 of appellees' brief, a case is *coram judice* only "whenever a case is presented which brings this power into action", and it is added that if a petitioner "states such a case" as would be impervious to demurrer, "it is an undoubted case of jurisdiction": but who disputes that? Our insistence has always been that, quoad this receivership, no "case is presented "which brings this power into action"; and we have always claimed that the complainants in the original suit did not "state such a case" as would create, quoad this receivership, "an undoubted case of jurisdiction". On page 18 it is asserted that

> "the cases cited by appellants in support of this contention where they are at all pertinent relate to situations where jurisdiction is limited by statute, or by the presence or absence of certain jurisdictional facts";

but we rise to inquire what is meant by the enigmatic phrase "the presence or absence of certain jurisdic- "tional facts"; and we respectfully insist that we should very much have preferred a critical analysis of the cases cited by us to the bald generality just quoted. If "the presence or absence of certain jurisdictional "facts" mean, to employ the language of the Arredondo case, the presentation of a case which brings the power to hear and determine into action, how does this suggestion by the appellees advance the correct resolution of the cause at bar? The assertion on page 18 that

> "general jurisdiction necessarily includes the power to do anything and everything that equity and good conscience require",

is flatly contradicted by the entire current of respectable authority upon this topic, many illustrations of which will be found on pages 27-29 of our opening brief. In one of those cases (*Reynolds v. Stockton,* 140 U. S. 254) the Supreme Court quoted with approval from a New Jersey case, to this effect:

> "It is impossible to concede that, because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises".

But without further developing this matter, we decline to concede that general jurisdiction includes the power to do anything and everything which, in the opinion of a chancellor, equity and good conscience may require: modern conditions no longer justify the sarcastic criticism of Selden to the effect that the chancellor's foot was the standard of measure, and that "one chancellor has a long foot, another a short foot and a third an indifferent foot"; and as remarked by the Circuit Court of Appeals for the Eighth Circuit:

> "In the formative period of equity jurisprudence the English Chancellors, in the absence of established principles and recognized sensible precedents, were much given to the pursuit of their own sense of absolute right and the dictates of their own individual conscience. But in the process of development, equity jurisprudence has assumed more the qualities of a composite system of settled rules and principles, by which the property rights of parties are measured and limited, and are rendered more certain and stable".
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> *MacElroy v. Masterson,* 156 Fed. 36-42.

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And on this page 18, the distinction between an equity suit proper, upon the one side, and the appointment of a receiver, upon the other,—a distinction for which we have always contended,—seems to be recognized. It is there said that,

> "the appointment of a receiver was not the subject matter of the suit. Indeed such a remedy is never primarily the subject matter of a suit but is always ancillary to the subject matter",—

in other words, to use a phrase from *Hovey v. McDonald,* 109 U. S. 150, a receivership is a "side issue" in an equity suit, and a side issue which may or may not make its appearance, and a side issue without which the main suit may readily progress to a final decree upon its own merits.

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And while we think that this admission disposes of all criticism as to the appealability of this order, and as to this appeal having been prematurely taken, we decline to concede the soundness of the next observation of the appellees, in substance to the effect that where a court has jurisdiction of the "case generally", it follows that it would have jurisdiction over the purely ancillary matter of the appointment of a receiver: this, we dispute; and as pointed out in our opening brief (pages 22-33), it is quite readily conceivable that while a court might have jurisdiction of "the case generally", yet it would have no jurisdiction of the purely ancillary matter of the appointment of a receiver,—such a situation is readily conceivable according to the law of the domicile of the corporation involved in the cause at bar (*Elliott*

v. Superior Court, 168 Cal. 727). On page 19 it is stated that

> "the contention of appellants that the jurisdiction to appoint a receiver is present only in a case where under the showing made a receiver should be appointed, necessarily leads to the ridiculous conclusion that whenever an appellate court decrees that a receiver should not have been appointed, the court in appointing him must be said to have exceeded its jurisdiction".

In reply to this it may be said that the contention of appellees that jurisdiction to appoint a receiver is present in a case where under the showing made a receiver should not be appointed necessarily leads to the ridiculous conclusion that whenever an appellate court decrees that a receiver should not have been appointed, the court in appointing him cannot be said to have exceeded its jurisdiction; and to the ridiculous conclusion that the court in the Arrendondo case was grossly in error when it held that a case was *coram judice* "whenever a case is presented which brings this power "into action"; and to the ridiculous conclusion that in the Elliott case, supra, for another example, the Supreme Court of California was grossly in error in holding that although the Superior Court had jurisdiction of an ordinary action at law brought by a private individual against a corporation for goods sold and delivered, yet that same court was quite without jurisdiction to appoint a receiver of the entire assets of the defendant corporation; and to the ridiculous conclusion that any court can make jurisdiction for itself by the appointment of a receiver in a case in which, under the principles and rules of equity, no authority existed for such an appointment.

isdiction Silence.

We cannot appreciate the significance of the inferior and third-rate suggestion that the lack of jurisdiction of the lower court to appoint a receiver is in the slightest degree affected, or could be affected by the alleged raising of that question for the first time upon this present appeal. Jurisdiction is neither created nor destroyed, nor qualified nor affected, by any lapse of a party litigant; it does not take its origin from any such source; a court of the United States has such jurisdiction only, original or appellate, as is conferred on it by Congress, within the constitutional limits (*U. S. v. Mar Yin Yuen,* 123 Fed. 159):

> "That this court is one of limited jurisdiction need only be stated, without argument, and without citation from any of almost innumerable authorities; and it can be said with like emphasis that in doubtful cases the doubt is to be solved against jurisdiction being entertained"

(*White Swan Mines Co. v. Balliett,* 134 Fed. 1004); and in a suit in the federal courts, the question of jurisdiction is fundamental, and may be raised at any time, in any mode, and at every step in the proceedings, either by the court of its own motion, or by the parties, and such investigation may be instituted as shall be necessary to establish or defeat the court's jurisdiction (*Kreider v. Cole,* 149 Fed. 647).

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Nor do we understand the suggestion that if the order appointing the receiver were void, the lower court would have no discretion to exercise with respect to the administration expenses, because its custody of the property through the receiver was without right; why, indeed, should not a court under such circumstances deal with such administration expenses?

Assume the order appointing the receiver to have been void, and assume that by reason thereof the receivership is terminated to the extent of surrendering the property in the possession of the receiver to the parties held entitled thereto; why should this prevent the court from determining the ultimate liability for those administration expenses, and in the light of that determination dealing with the consequent arithmetic? Our opponents cite no authority to sustain this claim; but Mr. Justice Brewer could find no difficulty in recognizing that jurisdiction does not necessarily cease when a receivership is terminated to the extent of surrendering the property in the possession of the receiver, because

> "it is a common practise in courts of equity, anxious as they are to be relieved of the care of property, to turn it over to the parties held entitled thereto, even before the final settlement of all claims against it, and at the same time to leave to the receiver the further defense of such claims, the party receiving the property giving security to abide by any decrees which may finally be entered against the estate" (*Bosworth v. Terminal Association*, 174 U. S. 182, 189-190).

Statutory Restrictions.

On page 20, it is suggested that the appointment of a receiver might be void for lack of jurisdiction by reason of statutory restrictions; but no such statutory restriction is claimed in the instant case, nor could it be claimed in view of the provisions of section 564 of the Code of Civil Procedure; but statutory restrictions are not the only restrictions; and we submit that no jurisdiction exists in any court whereby that court is authorized, through a receiver, to take charge of the business and property of a corporation before dis-

solution and while it was a going concern, oust its officers and terminate its activity, in a suit prosecuted by a private party. It is true that the receiver was not appointed in the instant case until the hearing upon the merits had been concluded, which is but another way of saying that this receiver was not appointed until the learned trial judge had before him precisely the same materials from which the appellate court made up its decree discharging the receiver. The suggestion is made that this whole matter was not free from doubt, because of the dissenting opinion of one member of this court, who concurred, so our opponents say, with the judgment of the lower court as to the propriety of the appointment of a receiver under the showing made; but a careful examination of that dissenting opinion fails to disclose, not only the slightest reference in terms to the receivership, but also any deliberate or reasoned suggestion speaking to the point of the propriety of the appointment of a receiver under the showing made; and when we consider that this dissenting opinion was laid before the Supreme Court of the United States, upon the application for a writ of certiorari, but that writ was denied, we can draw no further inference than that this dissenting opinion was without weight or influence with the court of ultimate decision in this country.

lleged dmissions.

It is then suggested that upon the former appeal the appellants admitted and conceded the jurisdiction of the lower court to appoint the receiver; but whether this assertion be true or not true we do not now stop to inquire, because as is plain from the authorities

heretofore cited, jurisdiction cannot arise by consent, or by failure to object, or by any admission or concession of a party litigant; and it seems to us that the attitude of a litigant is quite obviously insecure when he resorts to a line of argument of this type. The case of *St. Louis Ry. v. Wear,* cited at the top of page 21 of appellees' brief, was selected from a table of cases cited by us on page 29 of our opening brief, where it was referred to as supporting the proposition that in order that jurisdiction should exist in any tribunal in any matter, there must be not only the abstract power to hear and determine, but also the concrete power to hear and determine the particular case, and render the particular judgment in that particular case, within the issues of that particular case, and in accordance with the established procedure governing that particular case; and we were there not dealing with the writ of prohibition, a remedy as to which different states adopt different policies. Thus, in a Californian case it is laid down that where an order fixing the compensation of a receiver directs it to be paid out of the fund in the receiver's hands, as was the case here (Trans. 3896, pp. 505-6), such order will be a final judgment and appealable by any party interested in the fund, and there being a remedy by appeal or certiorari, a writ of prohibition will not lie to arrest the proceedings in the Superior Court (*Grant v. Superior Court,* 106 Cal. 324; and see, also, *Fisher v. Superior Court,* 110 Id. 129; *Murray v. Superior Court,* 129 Id. 628; *Jacobs v. Superior Court,* 133 Id. 364).

Prohibition.

It is then suggested that if excess of jurisdiction is to be urged, good faith would have required a resort to the remedy of prohibition to prevent the accrual of receivership expenses and the further damaging results complained of; but if there be one feature of this litigation against which these appellants have strenuously objected throughout, it was the appointment of this receiver; and how any person reading this whole record with an open mind can doubt for an instant the good faith of that opposition, we are simply unable to understand. According to the law of the domicile of this corporation, prohibition was not an appropriate remedy; and if the fact,—if it be a fact at all, which we dispute,—that the jurisdiction to appoint this receiver was unchallenged upon the former appeal, should suggest that the present contention is an afterthought, that suggestion is answered not only by the unremitting antagonism by these appellants to this receivership during the hearing below and in the briefs upon the former appeal, but also by the suggestions which we have made, and supported by reference to well considered federal decisions, that no jurisdiction is possible, in a federal court, to be conferred by inaction, waiver or consent. While it is true that during the hearing of the main case the burden of the complainant's song was the fraud of William S. Noyes, while it is true that his case rested upon that asserted fraud, and while it is true that upon the former appeal the principal attention of these appellants was directed to the refutation of that abominable imputation, yet it is not true, as the record there will demonstrate, that the appointment of this receiver was "unchallenged".

"Superior Equities."

The next section of appellees' brief, included between pages 21 and 30 thereof is entitled: "Superior Equities"; and in effect it is a contention that in the taxation of receivership costs,—a matter obviously resting in a discretion purely equitable,—a consideration of superior equities would be inadmissible. Much that is said in this portion of the appellees' brief has already been commented upon, more or less, in connection with what we have hitherto said; and we shall not repeat in this place any of those observations. Bearing in mind the remarks made on pages 21, 22 and 23 of this portion of the brief we can only repeat that a receivership is not an indispensable feature of every equity suit; it is a thing apart from the main body of the litigation; as in the cause at bar an equity suit may readily proceed to a decision upon the merits without any receivership whatever; it has its own origin, its own existence, its own termination; and decrees of courts winding it up and terminating its affairs have, as we have already seen, the quality of finality and of appealability. But if this be so, why should not, upon the termination and final closure of a receivership, its associated business be likewise terminated and closed up? What principle of law justifies the closure of a receivership while leaving matters of moment connected with it quite undisposed of? Why compel these appellants, in a matter which has already reached its own definite conclusion, to await a final decree, when the entire immediate subject matter can be expeditiously disposed of upon the present hearing? Is it any answer to this position to say baldly that the time-saving result sought by these

appellants "was not done"? And if it be legitimate upon the closure of a receivership to wind up its associated business as well as itself, why should not the disposition of those associated matters, in so far as they rest in equitable discretion, be themselves disposed of in the light of the superior equities, and especially the adjudged superior equities, of the parties? Could any fairer standard of decision be imagined than this?

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On pages 20, 23 and 24, many things are said which leave the impression that the writer of this brief is unfamiliar with the prior decisions of this court upon the main case and the refusal of the Supreme Court of the United States to review the disposition of the case there made. For example it is said on page 23, that two minority stockholders, because of the dominance and control of corporate affairs by the majority were compelled for the protection of their own interests and the interests of other minority stockholders and of the corporation, to commence this action for the purpose of recovering from some of the majority stockholders valuable property rights; is this statement, put in just this way, with all of its assumptions and implications, sustained by the record? Did two of the minority stockholders act as is here intimated? What act, we ask, does the record disclose as having been actually performed by Martin for the purpose stated? When did he ever visit the mine? What testimony did he ever give? What deposition did he ever make? What letter did he ever write dealing with Company affairs? On what particular day during the trial was

he ever present in court? What particular document, pleading or otherwise, visible in this record, did he ever sign? What was the nature, character and extent of any actual visible participation by him in this controversy? While it is true that:

> "You may turn, you may twist, this case as you will,
> The clamor of Overton rings through it still",

while it is true that Overton, spurred by his desire to "control the management" of this enterprise, was ubiquitous throughout this litigation, yet who constituted the "two of the minority stockholders"?

It is then said that these mysterious "two of the "minority stockholders" were compelled by reason of the domination and control of corporate affairs by the majority to begin this action; the implication here is not only unwarranted in itself and contradicted by the record, but is in flat antagonism to the views expressed, not only by Judge Dooling, but also by this court. If it were not sought by this statement to suggest an implication unfavorable to the present appellants, this statement, especially when we look back over the past history of this litigation, would be without purpose or meaning; and assuming, then, that the intention which inspired it was one inimical to these appellants, we take the liberty of quoting in this place the following brief excerpt from the original opinion of this court in this cause:

> "In all of these transactions we find no evidence of fraud or of unfair or inequitable conduct on the part of William S. Noyes in his dealings with the Presidio Mining Company or any of its stockholders, and no assertion of a dominant, sinister power or influence over the board of directors or any of the stockholders. . . .

> Upon the face of the record and in view of all the evidence, we are of the opinion that the lease of January 25, 1913, the resolution of February 15, 1913, and the lease of November 19, 1913, were all legal, just and equitable in their terms and for a valuable consideration".

The "valuable property rights" referred to in this portion of the appellees' brief had reference, without doubt, to the piece of land known as Section 5; and it is stated by the appellees at the place cited that "as a result to their activities in that behalf", there was an "enforced conveyance of Section 5": but these statements we flatly deny. If there was one feature of this case which was prominent, a feature unfortunately not referred to in the dissenting opinion handed down for the first time after the rehearing,—it was the continued willingness of Mr. Noyes, expressed in writing, orally, and in reports to the stockholders, to transfer Section 5 to the company upon payment to him of its purchase price and incidental moneys,—an attitude recognized even in the original interlocutory decree which was the subject of contention upon the original appeal. A conveyance of Section 5 by Mr. Noyes was therefore not "an enforced conveyance": on the contrary as pointed out in the opinion on rehearing announced January 17, 1921:

> "Noyes admits he purchased the title of Section 5 for the Presidio Mining Company. It has been judicially determined that he did so with his own money as the decree recites, and the record shows that he has been ready and willing at all times since said purchase to convey the title to the Presidio Mining Company upon being paid the purchase price. He does not refuse to convey.

> He does not hold the title fraudulently. His willingness to convey upon the payment of the purchase price deprives equity of its jurisdiction to declare Noyes' relation to the title fraudulent''.

We deny that

> ''the three years of receivership administration of the properties of the defendant corporation resulted in the accumulation over and above all expenses of operation, taxes, receivership costs, of upwards of a half a million dollars'';

this suggestion we have answered elsewhere; and we do not conceive it necessary to repeat that reply in this place.

The Pleadings in the Main Case.

Between pages 25 and 27, the debilitated fallacy based upon the language employed in the complainant's amended bill below and the defendants answer thereto, is renewed; and we devote a few lines to the consideration thereof bearing in mind that

> ''a defendant has no right to anticipate or undertake to control by his pleadings the nature or character of the proof upon which his adversary may think proper to rely in support of his cause of action, nor to ground his defense upon any such proofs. *He must deal with the facts as they are set forth in the declaration;* and not with the supposed or presumed evidence of them'' (*U. S. v. Girault*, 52 U. S. (11 How.) 22, 29-30).

The amended bill of complaint was filed below on September 25, 1915. In paragraph VII thereof (Trans. 3253 p. 43) it alleged that since the middle of December, 1912, Mr. William S. Noyes was the owner of Section 5, and that since May 26, 1913, he was the record owner thereof continuously until the filing of this amended bill; and then, after having thus admitted Mr. Noyes' ownership, and after having proceeded with certain

allegations of alleged fraud, this amended bill in paragraph XVI claimed that the mining company, since December, 1912, was the equitable owner and entitled to the possession of Section 5 of which, it was claimed, Mr. Noyes was a trustee. These same allegations had been in substance contained in the original bill of the complainants; but concerning that original bill, Judge Dooling observed,

> "The bill here does not show that the property bought by defendant Noyes was so bought with the money of defendant Presidio Mining Company. Nor does it show that the lease between said defendants is not a profitable one for the mining company. Nor does it show that defendant Noyes is not the owner of the leased property, or that the defendant company has any legal or equitable interest therein".

When the defendants below came to answer this amended bill, they admitted that since about the middle of December, 1912, Mr. Noyes was the owner of Section 5, and that he was the record owner thereof continuously since May 26, 1913; but they alleged that he was such owner only in the sense and by reason of the fact that during said time he was the owner of substantially all or all of the capital stock of the Silver Hill Mill and Mining Company, the then record owner of said Section 5 (Trans. 3253, p. 95); and answering the claims of the amended bill concerning the equitable ownership of Section 5, the defendants, following the language of the bill, denied that the Presidio Mining Company was the equitable owner or entitled to the possession of Section 5, and denied that Mr. Noyes was the trustee of Section 5 for the Presidio Mining Company or any other person; and then, in paragraph

22 of said answer, beginning at page 137 of the transcript in No. 3253, the defendants went on with a very full statement of the history of Section 5 and the relations of Mr. Noyes with reference thereto. On the hearing testimony supporting these allegations was given. Thereafter, in disposing of this matter, this court, recurring to the views of Judge Dooling, remarked:

> "The third ground of failure of the original bill to state a case for equitable relief was that it did not show that Noyes was not the owner of Section 5. That question has already been disposed of by the finding of the interlocutory decree and the proof that Noyes is and has been the owner of Section 5 since May 26, 1913. . . .
>
> The object of this suit is to establish a constructive trust in Noyes for the ownership of Section 5 for the benefit of the Presidio Mining Company. The Court below in its interlocutory decree found that Noyes purchased Section 5 with his own money. We concur in that finding, to which we add a finding that the purchase was made after the Presidio Mining Company had refused to make the purchase because of its financial inability as recited in the lease of November 19, 1913. But the plaintiffs charge Noyes with having acted in a fiduciary capacity in the purchase because of his relation to the company as an officer and director and that his action was fraudulent. It is further charged that he obtained the title in his own name through fraud, misrepresentation and concealment and that this fraud and concealment was participated in by the other officers and directors of the company and its majority stockholders. These allegations are denied by the defendants under oath. . . .
>
> *In all of these transactions we find no evidence of fraud or of unfair or inequitable conduct on the part of Wm. S. Noyes in his dealings with the Presidio Mining Company or any of its stockholders and no assertion of a dominant sinister power or influence over the Board of Directors or any of the stockholders.* The lease of January 25, 1913, was adopted by the Board of Directors

of the company at a meeting of the board held on January 29, 1913. Wm. S. Noyes was not present at the meeting. He was elected a director at a meeting of the board held on January 31, 1913. On that date he was in Texas and had been there since shortly after the middle of December, 1912, and he remained there until February 5th or 10th, 1913. He was present when the so-called 'bonus resolution' was passed on February 15, 1913, but he took no part in the proceedings. He was not present when the lease of November 19, 1913, was approved and signed. *Upon the face of the record and in view of all the evidence we are of the opinion that the lease of January 25, 1913, the resolution of February 15, 1913, and the lease of November 19, 1913, were all legal, just and equitable in their terms and for a valuable consideration.* . . .

It is clear from this evidence that Noyes purchased Section 5 with his own money but for the benefit of the Presidio Mining Company; that he has always been ready to convey it to the company upon the payment to him of its purchase price and as late as February 28, 1916, in his last report to the stockholders, he declared in effect that he held the title for that purpose and no other."

And in the opinion on rehearing, this court added:

"The plaintiffs claim that this decree raises a constructive trust wherein Wm. S. Noyes, while holding a fiduciary relation to the Presidio Mining Company, acquired the title to Section 5, but this is not sufficient to entitle the plaintiffs to a decree which carries with it the judicial declaration of a fraudulent acquisition of the title by Noyes and that he has refused and still refuses to convey the title to Section 5 to the Presidio Mining Company upon the payment of the purchase price. Noyes admits that he purchased the title to Section 5 for the Presidio Mining Company. It has been judicially determined that he did so with his own money as the decree recites, and the record shows that he has been ready and willing at all times since said purchase, to convey the title to the Presidio Mining Company upon being paid the purchase price. He does not refuse to

> convey. He does not hold the title fraudulently. His willingness to convey upon the payment of the purchase price deprives equity of its jurisdiction to declare Noyes' relation to the title fraudulent. What then remains for equity? It may decree specific performance, a remedy within the discretion of the court".

We think that fair consideration of the foregoing, together with the fair inferences of fact deducible therefrom, and together with the application thereto of familiar principles of law, will sufficiently exhibit the futility of appellees' suggestions in this connection.

Prior Decisions in this Cause Further Ignored.

On pages 27-30, many things are said by the appellees which are fully met in the opinions of this court heretofore delivered in this controversy: the whole Osborn history, for example, was fully considered in the original case, and cannot, upon familiar grounds be reopened at this time; and as to any compulsion of the corporation, against its own interests, to deny any right to section 5, because of the majority control held by individual appellants, we feel that we are entitled to rest upon the views of Judge Dooling, upon the views of Judge Van Fleet, who recognized in his interlocutory decree the rights of Mr. Noyes, and the views of this court recognizing that Section 5 was actually purchased by Mr. Noyes, with his own funds, and recognizing, too, his perfect willingness at any time to convey the same to the company upon payment of the purchase price and incidental moneys,—from the beginning of this business to the end of it, William S. Noyes has never resisted the transfer of Section 5, but he *did* resist, and with success, complainant's unfounded accusation of fraud.

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We do not understand what is meant by the expression, used with reference to "receivership costs" at the bottom of page 28 and the top of page 29, "only tempo-
" rarily provided for out of the funds". The idea seems to be that the order appealed from did not tax "receivership costs" at all, as we think the court should have done, but only temporarily provided for them out of the fund: but we think that whatever form of words may be used, the loss to the corporation by compelling it to pay for the wrong which has been done to it, whether that payment be "temporarily provided for", or otherwise, would be precisely the same. But when a receivership comes to an end, is finally closed, the receiver discharged, his sureties exonerated, and that chapter of the history terminated, what is meant by such an expression as "temporarily provided for out of the fund"? Was the receivership terminated or not terminated? When we speak of temporary provision, we have in mind something quite different from final provision; and we are quite unable to grasp the idea that it is possible for the same thing to be and not to be at one and the same time. It is plain, however, that if this appeal had not been taken within the time allowed by law, what was "only temporarily provided for
" out of the fund" would now be "permanently pro-
" vided for out of the fund", at least as far as the receiver is concerned. Can the trial court first "tempo-
" rarily provide" and then "permanently provide" by simple inaction in failing to enter a final decree generally? And no final decree has yet been entered by the trial court in this cause.

Another misleading ambiguity in this portion of the appellees' brief is to be found in the suggestion that these appellants "consented" to the diversion of corporate moneys to the payment of the expenses of a receivership which with unbroken antagonism they have steadily resisted from the beginning; we believe that the mere statement of this matter is sufficient to show that while these appellants may have made no question concerning the regularity of the receiver's arithmetic, they never once consented to any payment in the sense that such consent involved any recognition of the receivership or of its attendant expense. In passing from this section of the appellees' brief, we frankly confess our inability to appreciate the doctrine of constructive assent to jurisdiction whether as applied to the master's allowance or otherwise, and in this connection we refer to the objection formulated on pages 368 to 370 of the present record.

Appellants' "Consent".

In view of what is said on pages 30-32, of the brief under consideration relative to the taxation of receivership costs upon the coming in of the final report of the receiver, we are compelled to repeat that in view of the nature of a receivership, its ancillary character, and its separability from the main litigation, we can perceive no good reason why when that independent phase is itself terminated, its associated business, affairs and interests should not likewise be terminated if it ever be to the interest of the Republic that an end should be put at any time to litigation. We know of no sufficient reason why this should not have been done: we know of no sufficient reason why the principles governing this mat-

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ter cannot be determined upon the present appeal in such a decree as, taking into consideration the whole situation, shall be conformable to equity and good conscience in the premises; and we think it no answer whatever to this position to assert to us that the lower court did not do this thing, without accompanying that assertion by some logical reason to sustain it. On this appeal, we are not concerned with the taxation of costs generally, or the costs in the main case: we are concerned solely with the expenses connected with a wholly unnecessary and rejected receivership which has finally come to its end.

In that portion of the brief described as the "conclusion" from page 32 to the end, we find a number of statements made which at this time we do not stop to criticise for the reason that they are all considered and disposed of in the former opinions of this court and in the ruling of the Supreme Court on the application for certiorari; and in so far as any assertion there contained has to do with any subject matter not fully considered and disposed of by these prior opinions, such matters have, we think, been sufficiently fully considered in the criticisms heretofore presented. It would be a waste of the time and patience of this court to go again over matters so fully considered in the briefs and opinions heretofore filed in this cause.

ellants' ulation.

In the "argument on behalf of the receiver", we note the unfair statement on page 2, to the effect that the stipulation agreeing upon Mr. Maling as the receiver was subject to the reservation by the defendants that it should not be construed to qualify their appeal from

the order, the word "appeal" being underscored,—as if this were a full and correct statement of the attitude of the present appellants with reference to the appointment of a receiver. It will be remembered that in the oral opinion of the learned trial court, after recognizing that the appointment of a receiver is "separate and dis- " tinct" from the reference of the case to a master for the purpose of taking an accounting, the learned trial judge went on to say that the circumstances were such as to "authorize" the appointment of a receiver for this property (Trans. 3235, p. 423) following which, came the interlocutory decree, which was originally appealed from. The appointment of a receiver being thus inevitable, the stipulation printed on page 436 of the original record was entered into; and we submit that while this stipulation *guarded* the appeal from the order appointing the receiver, still its plain purpose and intent was entirely in line with the objections and exceptions of the defendants consistently presented in opposition to the receiver, which objections and exceptions are recited as among, "the premises considered, under- "stood and agreed to". If the stipulation were intended to guard only the appeal from the order of appointment, why should the defendants have scrupulously inserted therein the recital, "whereas, in the above entitled mat- " ter, against the objections and exceptions of the above " named defendants, said court is about to give and make " its order that a receiver be appointed herein"?

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Complaint is made on the same page to the effect that the appellants did not move to have the receiver return the property until the mandate of this court was presented on May 6, 1921. Is there no explanation for this alleged detail which is known to the receiver or his solicitor? Did the receiver or his solicitor know that by the decree of this court of October 27, 1919, the receiver was actually discharged? Did they know that following upon that decision, and on November 17, 1919, application was made to this court for a diminution of the record which was disposed of on January 5, 1920, only to be followed on January 26, 1920, by a petition for rehearing which was subsequently granted and heard on May 21, 1920, and decided on January 17, 1921? And again, were the receiver and his counsel unfamiliar with the petition for a writ of certiorari immediately addressed to the Supreme Court of the United States and by that court denied on April 25, 1921, only eleven days prior to the presentation of the mandate on May 6, 1921, referred to on page 2 of the receiver's argument? These facts explain, and we venture to think sufficiently, why

> "appellants made no move to have the receiver return the property until their motion made when they presented the mandate of this court on May 6, 1921";

but since these facts must have been known to the receiver and to his solicitor when he wrote this argument, we are unable to understand why as a matter of common fairness to the court and their opponents, no reference was made to these explanatory facts.

Appellants' Opposition t Receivershi not "Seri- ous".

On page 3, the suggestion is made that the objections of the present appellants to the appointment of a receiver were

> "seemingly more for the purpose of preserving a record than as a serious opposition to the possession of the receiver";

but we ask looking back over the history of this litigation, and the constant and unremitting antagonism of these appellants to the invasion of the property of the company by the receiver, what opposition could have been more serious? So far as permitting the receiver to "remain in possession until the final determination "of the appeal" is concerned, we point to the history intervening between the making of the interlocutory decree originally appealed from and the order of the Supreme Court of the United States denying certiorari, to explain, not why the receiver was permitted to remain in possession, but why he was not more promptly removed. The statement on the same page that "this "court deemed it equitable that complainants should "have substantial relief", seems to call for no other criticism than that upon every serious feature of the case, the lower court was reversed, as we have pointed out in our opening brief herein, and that the only "sub- "stantial relief" accorded was the outgrowth and product of the willingness of Mr. Noyes to convey Section 5, which he had bought with his own money, to this company, and the judicial approval of his attitude with regard to that section.

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n Case.

At the top of page 4, the statement is made, somewhat more euphuistically than comprehensively, that the action was tried in the lower court upon pleadings which charged that "on certain equitable grounds", the company was the beneficial owner of Section 5; but it must not be forgotten that the so-called "certain "equitable grounds" had their foundation in that fraud so vociferously asserted by the complainants, and so completely rejected by the appellate court. The learned trial judge did not decree that Mr. Noyes should transfer Section 5 to the Presidio Mining Company "by "preparing deed, etc."; on the contrary, he decreed that William S. Noyes should transfer Section 5 to the Presidio Mining Company, and that he should be credited with the purchase price thereof, together with interest thereon at the rate of seven per cent per annum from January 25, 1913.

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Courts.

One of the most interesting observations contained in the printed argument for the receiver will be found on pages 5 and 6 thereof; it deals with the respective points of view of the learned trial judge and of this court, and after suggesting that this court dealt with Section 5 "apparently upon a different ground" from that upon which the lower court reached its conclusion, went on to say that "while the grounds of the "two courts in form are not identical, in essence they "are". The fact, however, is that in the lower court, from the beginning of the hearing to the end, the complainants bottomed their case upon the thought of fraud: every act of their opponents was fraudulent, no act of their opponents was honest; and because of

this all-pervading fraud relief was asked in the amended prayer to the amended bill which involved the very extinction of the corporation. And this claim was responded to by the learned trial judge, not only in his oral opinion, as we have pointed out in our opening brief, but also in his interlocutory decree, the primary finding in which is

> "that defendants other than Presidio Mining Company, as its majority stockholders, directors and officers since December, 1912, in conducting its affairs, each, every and all have been and now are guilty of fraud upon the Presidio Mining Company and its minority stockholders" (Trans. 3253, page 424).

This thought of fraud permeates the interlocutory decree from end to end: the remaining provisions of that decree are merely applications to special matters of the general finding of fraud; and nowhere is the accusation of fraud more rampant than in that portion of the interlocutory decree which dealt with Section 5, all dealings of Mr. Noyes with reference to that section, and all claims of his having any relation thereto, being pronounced fraudulent and illegal. The entire case before the learned trial judge was attempted to have been built up upon this cardinal thought of fraud, but no successful pretence can be made that any transfer of Section 5 to this company which was directed by the decree of *this court* to be made, was based upon any fraud of William S. Noyes, or that such decree was based upon any other foundation than the repeatedly expressed willingness of Mr. Noyes to make that very transfer.

What, upon the other hand, was the attitude of this court? Was the attitude of this court in essence identical with that of the lower court? The assertion of the attorney for the receiver is that in essence the grounds of the two courts were identical, though differing in form: but if this were so, why was it that this court rejected and rejected properly the complainants multiform accusations of fraud, cleared the appellants from that accusation, and put the transfer of Section 5 upon a ground essentially and fundamentally distinct from any which involved the faintest tincture of fraud? According to the one court, the trial court, the transfer of Section 5 was coerced by reason of the alleged fraud claimed by the complainants: in the other court, that transfer was the outcome of the desire and willingness of Mr. Noyes, publicly and repeatedly expressed, to transfer the section to the company upon payment of its purchase price and incidental moneys, and wholly independent of any atom of fraud whatever.

re consis-cy".

On page 6, after referring to the condition of the pleadings, it is said that this court "On the whole case" followed the judgment and opinion of the lower court: but what "whole case"? The "whole case" of the complainants below had been one of fraud: in the Appellate Court this claim received its quietus and the defendants were absolved from the untruthful accusation: is this "following the judgment and opinion "of the lower court"? It is then stated that this court "found that it was equitable that William S. Noyes "should convey Section 5 to the Presidio Mining Company": when did William S. Noyes ever claim that

such a conveyance would be inequitable? And why did this court find that it was equitable that this conveyance should be made? Was it because of the charges of fraud on which the complainants had so harped, or was it because of Mr. Noyes repeated offer to make the conveyance upon receipt of payments to which it has been adjudged he was entitled?

No Accord Between Trial and Appellate Courts.

There is at the top of page 7 a statement which looks very much like an admission that the receivership complained of was unnecessary: but it is put upon the fact that certain matters appeared to the court from the testimony of Mr. Noyes; and while we quite agree that the testimony of Mr. Noyes was entitled to the fullest weight in the determination of the case, we think also that attention should be directed to that of other witnesses whose clearcut testimony corroborated him, and corroborated him without a shadow of contradiction. On page 7 it is said that this court made its decree relative to the conveyance of Section 5, evidently for the reason that had the action been dismissed, an estoppel might arise against the company growing out of its answer; but we find no such reason stated in the opinion: we find the court saying that:

> "Upon this evidence we did not direct the dismissal of the action as we might have done and as the defendants insist we should have done and should do now; but in view of all the circumstances, in the interest of what appeared to be the substantial rights of the parties and an equitable and economical disposition of the controversy, we treated the action as in the nature of a notice for the specific performance of an agreement to sell Section 5 with a notice to terminate the lease of November 19, 1913, in accordance with its terms and an accounting that would provide for the conveyance by Wm. S.

> Noyes of Section 5 to the Presidio Mining Company upon the payment to him of the purchase price, together with interest and all taxes and assessments paid by him during the ownership of the property in accordance with his repeated offer. This was a remedy within the sound discretion of the court and we deemed it appropriate to the circumstances of the case and authorized by the direction contained in Section 269 of the Revised Statutes of the United States, as amended by the act of February 26, 1919 (40 Stat. 1181)";

and thus, having before us the actual statement of the court itself, counsel's speculation as to the reason for the decree ceases to be of any interest. We are unable to understand what is meant, therefore, by the statement on page 7, that both courts "were in accord "upon the principal object of the amended bill". We assume that the object of a pleading will be found within its four corners; and when we contrast the amended bill, especially as lit up by the amended prayer to the amended bill, with the contents of the two opinions of this court, we fail to see, as pointed out in our opening brief, a single material feature as to which the two courts were in accord.

titude of . W. S. yes.

The statement at the top of page 8 to the effect that this court found that Mr. Noyes had "in effect" promised to convey comes to us with something of a surprise: we know of no authority for this statement: Mr. Noyes did not "in effect" promise to convey; and from the beginning to the end Mr. Noyes promised and declared in plain and *unmistakable* terms his desire and intention, his set purpose and his willingness, to convey, asking only what he was entitled to, viz.: that he should be made whole upon his expenditures. There can

be no mistake about Mr. Noyes' attitude in this matter: his purpose was so plain that the swiftest runner might readily read it; and what he had to say on this topic was not something said "in effect", but it was something said with the most obvious clarity and distinctness. On the same page we find repeated the statement that "on "the whole case the substantive part of the judgment " of the lower court was affirmed": but since we have already sufficiently analyzed this thought in our opening brief, we do not stop now further to develop its insubstantial character.

Receiver's Interim Reports Not Final.

The remaining portion of the printed argument for the receiver is given up to the claim, in substance, that the present appellants should have appealed in each instance when an interim report was filed by the receiver and ruled upon by the lower court: but, we respectfully insist that the action of the lower court in dealing with the interim reports of the receiver was not final. The record shows that upon various occasions prior to the filing of the fourth and final account, the receiver from time to time presented to the lower court reports of his administration: the presentation of these interim reports provoked no change in the attitude of hostility to the receivership which steadily characterized these appellants: but the interim reports were approved by the lower court, and a summary of its action in this connection will be found in the objections of these appellants to the fourth and final account of the receiver. In the brief filed herein on behalf of the receiver, it is suggested that each of the orders of the lower court prior to the order confirming the fourth and final

account, was a final order not appealed from, the obvious suggestion being that no inquiry may now be made into those prior orders. But this receivership was continuous throughout the whole of the period covered by these various reports and until the redelivery of the property by the receiver to its owners after the application for a writ of certiorari had been denied by the Supreme Court of the United States, and it was the intention and expectation of the present appellees and of the learned judge of the trial court who made these interim orders that this receivership should be continued,—the continuation of the receivership was an essential ingredient in the situation in which the interim orders were made. This being so, the following language from a frequently cited California case becomes pertinent, it being steadily borne in mind that while the order of the court in that case stated in words that the receiver should continue in charge of the property of the parties, nevertheless, the same purpose actuated the learned trial judge in the cause at bar, and that, too, as obviously as if he had put his purpose into visible words:

> "It is not a question whether one aggrieved by such an order has the right of appeal,—that must be conceded,—but when such right may be exercised. We have not found any case in which such an order has been reviewed before final judgment. No good purpose could be subserbed by a rule authorizing an appeal from every order of this kind made during the pendency of the suit. It is the policy of the law to discourage litigation piecemeal. The order of the court concludes with the following direction: 'It is further ordered that said receiver

be and continue in charge of the property of said parties herein, and that he continue to act as receiver herein until the further orders of this court in the premises. Said receiver is hereby disallowed any compensation or attorneys' fees until the coming in of his final report herein on final determination of this cause, such compensation and attorneys' fees to be then fixed by the court as it may be then advised'. There are authorities holding that a receiver may appeal directly from an order made before judgment disallowing his final account; and it may be conceded that a party aggrieved by an order of the court, made before judgment allowing a final account of a receiver, may appeal without waiting for a final judgment in the case; that is not this case. The provision of the order quoted above shows that the receiver is still in possession of the assets of the firm, and acting on its behalf, under orders of the court. There will be other reports to make. The final account will refer to previous reports filed, and when that is settled any one aggrieved will be fully protected by an appeal, either from the final order or from the judgment. It may happen that those who object to the acts of the receiver during the first part of his administration will be entirely satisfied with the general result, and have no objection to the approval of his final account of the whole matter.''

Rochat v. Gee, 91 Cal. 355, 357-8.

In point of fact, upon the coming in of the final report of such a receiver, facts might be developed which would disentitle him and his counsel to receive any compensation, even if they did not put the receiver in a position tantamount to that of a debtor to the enterprise of which he had temporary control.

Second.

THE AUTHORITIES HEREIN.

Where the right of the plaintiff to the appointment of the receiver is resisted from the beginning, and throughout the litigation, and it is finally determined that he had no right to have such receiver appointed, he will be charged with the costs and expenses of the receivership, and in such case receiver will be required to return the property to the defendant without deduction.

In our reply brief for appellants on rehearing of the main case in this court, we discussed the question now under consideration with the hope that this court might then have seen fit to express its views for the guidance of the trial court in settling the account of the receiver. We stated our position thus:

Where the right of the plaintiff to the appointment of the receiver is resisted from the beginning, and throughout the litigation, and it is finally determined that he had no right to have such receiver appointed, he will be charged with the costs and expenses of the receivership (p. 35).

We further contended that a careful reading of the cases which are claimed to be in conflict with the foregoing statement will be found to be cases in which the appointment of a receiver was made *with the consent of the opposing party, either express or implied,* by not resisting such appointment with all the power at his command. None of the cases cited by our opponent, when adequately analyzed, controvert this position; on

the contrary, all the cases cited by appellees will be found to be cases involving *consent,* and are therefore in nowise in point. In this case the outstanding feature is unremitting and successful opposition.

Since writing the foregoing we have examined many decisions dealing with this question of costs and expenses of receivership, and have not found one which is in conflict with the propositions of law stated above.

On the former appeal the receiver was not before the court and we did not discuss what logically follows from the foregoing principle of law, *that the receiver must return the property to the defendant without deduction.*

We now, therefore, state our position on this appeal as follows: *Where the right of the plaintiff to the appointment of the receiver is resisted from the beginning, and throughout the litigation, and it is finally determined that he had no right to have such receiver appointed, he will be charged with the costs and expenses of the receivership, and in such case receiver will be required to return the property to the defendant without deduction.*

The appellees, of course, endeavor to controvert these propositions of law. We will now present the authorities which support the above statement of the law, and will later return to a discussion of their authorities, and show wherein they fail to support their contentions.

Where the court is without jurisdiction in the main case, either of the parties or the subject matter of the suit, but nevertheless appoints a receiver of the prop-

erty of the defendants, the court is, of course, without jurisdiction to make the appointment, and by merely finding itself in the possession of the property, cannot order a charge to be imposed upon it.

There is only one possible exception to this rule and that is where the plaintiff seeks the appointment of a receiver and the defendants appear in court and consent that the receiver be appointed. While as a rule jurisdiction cannot be conferred by consent where it otherwise does not exist, nevertheless, as the receivership is an independent side issue, and as the court was placed in the possession of the property by the consent of the defendant, and was led by him to incur expenses in its care and administration, it has been held that the court in discharging the receiver may direct that his costs and expenses be paid out of the property. This exceptional rule was followed by the *Supreme Court in Palmer v. Texas,* 212 U. S. 118, a case cited by the appellees, to which we shall make further reference hereafter.

The general rule that an order allowing compensation, based upon a void order appointing a receiver, is itself void is laid down by the Supreme Court of California in *Sullivan v. Gage,* 145 Cal. 759-769, where that court said:

> "And in Grant v. Los Angeles etc. R. R. Co., 116 Cal. 71, it was contended by appellant that, as the order appointing the receiver was absolutely void upon its face for want of jurisdiction in the Court to make it, the order fixing the compensation of the receiver, being founded thereon, was equally void, and this Court, after discussion, summed the matter up in the following sentence: 'That order (appointing the receiver) being void, the

> present order must of necessity be held *as to appellant* likewise void'. So here it must result that the order allowing compensation, being based upon a void order appointing the receiver, is itself void."

In *Hawes v. First Nat. Bank of Madison,* 229 Fed. 51-59, the United States Circuit Court of Appeals for the Eighth Circuit states this general rule thus:

> "Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the Court."

While we contend that in this case at bar, the trial court had no jurisdiction to appoint the receiver, because from the date of the filing of the bill of complaint and throughout the trial down to the entry of the interlocutory decree on the main case, no facts were developed which showed necessity for a receiver, nevertheless we contend, aside from the question of jurisdiction, and on the ground that we resisted the appointment of the receiver at every stage of this litigation and resisted successfully by obtaining the judgment of the court that the appointment was illegal, improper and unnecessary, that the costs and expenses of the receivership must be adjudged against the complainants, and that the receiver must return to these defendants the property which came into his hands as receiver, without deductions with the exception of such expenditure as the defendant, Presidio Mining Company, would have been compelled to make in the conduct of its mining business had no receiver been appointed.

The pertinacity with which the complainants pursued their course to have the receiver appointed, as well as the manner in which the defendants resisted the appointment is set forth in "Defendants' Exceptions and Objections to Fourth and Final Report and Account of Receiver" which will be found in the record on this appeal (No. 3896) on pages 356 to 430 both inclusive.

The rule which we have stated above and for which we contend has met with approval by the U. S. Circuit Court of Appeals, Fifth Circuit, in *Beach v. Macon Grocery Co.,* 125 Fed. 513, where the court, speaking through Shelby, Circuit Judge, says, at page 515:

> "*It is a principle of general application that, if the appointment of a receiver is erroneous or void, and the adverse party does not acquiesce in it, but continues to contest it to a successful termination,* any compensation which may have accrued to the receiver in the meantime and his expenses incurred in the administration of the estate, *should be taxed to the parties who applied to have the appointment made.* On the other hand, if the appointment of the receiver is sustained, and the applicant obtains the relief sought by him in the pending suit, the items of expenses growing out of the receivership are proper charges against the unsuccessful defendants, and are chargeable and payable from his property in the possession of the court. We do not understand that the learned counsel for the respondents controverts these general rules. His position is that, the expenditure in question, having been made to preserve the property, is not an expense of the receivershp within the meaning of the mandate, and that under the circumstances of this case the $325 paid to feed and care for the stock is not 'an expense of receivership'. Authorities are quoted to sustain this contention. Excerpts from three cases are quoted. On examination of the cases we think that they do not sustain the contention.

> The point decided in Cassidy v. Harrelson, 1 Colo. App. 458; 29 Pac. 525, is but an affirmation of the general principle that, 'a receiver having been appointed by the court on application of the interveners in a cause wherein they were not entitled to intervene, the costs incident to the appointment were properly chargeable against them'; that is, against the unsuccessful parties."

Clark on the Law of Receivers, Vol. 1, page 887, states the rule in quoting approvingly from *Frick v. Fritz,* 124 Iowa 529, as follows:

> "But where the right of the plaintiff to subject the property for which he seeks to have a receiver appointed to the payment of his claim is resisted from the beginning, and the effect of the appointment of a receiver is to subject to the control of such receiver property in which the plaintiff is, as the result of the litigation, found to have had no interest or right whatever, it would evidently be unjust that after determination of the case against the plaintiff he should be allowed to have the expenses of the receivership which he has occasioned by his unfounded claim, and from which the opposite party derives no benefit, satisfied out of the property itself. Such a result would be inequitable, for it would throw upon defendant the burden of a litigation instituted by plaintiff without right."

In the case of *Hawes v. First National Bank of Madison,* 229 Fed. 51, decided by the Circuit Court of Appeals in the Eighth Circuit, we find the following statement of the rule at page 59:

> "Where a receivership is procured illegally, the costs of the receivership may be taxed against the complainant procuring the appointment of such receiver. Machinery Co. v. Hughes, 195 Ill. 413; 63 N. E. 186; 59 L. R. A. 673; McAnrow v. Martin, 183 Ill. 467; 56 N. E. 168; Higley v. Deane, 168 Ill. 266; 48 N. E. 50; State v. People's U. S. Bank, 197 Mo. 605; 95 S. W. 867; Cutter v. Pollock, 7 N. D. 631; 76 N. W. 235; Ephraim v. Pacific Bank, 129

Cal. 589; 62 Pac. 177; High on Receivers (3rd Ed.), Sec. 796; Beach on Receivers, Sec. 774.

In the case at bar, the court, being without jursdiction, has no property with which to pay any one, and hence is not ruled by Atlantic Trust Co. v. Chapman, 208 U. S. 360; 28 Sup. Ct. 406; 51 L. Ed. 528; 13 Ann. Cas. 1155. Courts may not seize property without jurisdiction, and then claim jurisdiction over the property because it is in the possession of the court."

"Reversed and remanded, with instructions."

In *Cabaniss v. Reco Mining Co.,* 116 Fed. 318, the Circuit Court of Appeals, Fifth Circuit, found, as this court found on the former appeal herein that the bill possessed no equity. The court said, at page 322:

> "This bill seems to us to be clearly without equity, and it affords no sufficient basis for an order appointing a receiver;"

and on page 324, the opinion proceeds as follows:

> "The order appointing a receiver herein is reversed and annulled, and the receiver appointed is discharged; and he shall forthwith turn over and deliver all property held by him as receiver to the party or parties from whom he received it; and this case is remanded with instructions to pass upon the receiver's accounts and compensation, all costs in the Circuit Court and expenses of receivership to be paid by the complainant in the three bills; and each party to the appeal will pay his own costs on appeal (Rogers v. Durant, 106 U. S. 644; 27 L. Ed. 303); and the Circuit Court is directed to dismiss all the bills in the consolidated case without prejudice."

In *Link Belt Machinery Co. v. Hughes,* 195 Ill. 413; 59 L. R. A. 673, it is said at page 679 (L. R. A.):

> "Where the receivership is procured under the assertion of an unjust and wrongful claim, as finally found by the court, the costs of the receivership may be taxed against the complainant procuring the appointment of

such receiver. In Highley v. Deane, 168 Ill. 266; 48 N. E. 50, the complainant was ordered to pay the costs of the proceeding and costs and expenses of the receiver. In McAnrow v. Martin, 183 Ill. 467; 56 N. E. 168, it was said that, when the appointment of the receiver is without authority of law, the court should order the complainant in the suit to pay the receiver's charges and disbursements, as a part of the costs in the case. In case of the illegality of the appointment of the receiver, and where his compensation is to be paid by the complainant who obtains such appointment, the amount of the receiver's compensation should be taxed against the complainant, the unsuccessful party in the cause. High, Receivers, 3rd ed. p. 796; Radford v. Folsom, 55 Iowa 276; 7 N. W. 604; Highly v. Deane, 168 Ill. 266; 48 N. E. 50."

The rule for which we contend is also the law in California. In *Lewis v. Hall,* 38 Cal. App. 329, the court says, at page 335:

"As to the plaintiff's appeal from the order charging her with the payment of the receiver's fees, it appears from the record that the appointment was made at the request of the plaintiff, and that the Land Company (who, as we have seen, was in possession of the land) had ample means and was able to respond to the plaintiff for any damages that might result to her from its possession or disposition of the crop. The court in its findings declared that the appointment of the receiver was improvidently and erroneously made. Under these circumstances it would have been manifestly unjust to charge the defendant's property with the compensation of the receiver, and, on the other hand, such expense could legitimately be imposed upon the plaintiff, at whose instance the receiver was appointed. (Frick v. Fritz, 124 Iowa 529, 100 N. W. 513; McAnrow v. Martin, 183 Ill. 467, 56 N. E. 168; Ephraim v. Pacific Bank, 129 Cal. 589, 62 Pac. 177."

In *Hickey v. Parrott Silver & Copper Mining Co.,* 32 Montana, 143; 79 Pac. 689; 108 Am. State Rep. 510, we

find the Supreme Court of the State of Montana approving the rule for which we contend in the following language:

> "'The compensation of a legally appointed receiver, while primarily chargeable to and payable out of the property or funds in his hands, as was held in Hutchinson v. Hampton, 1 Mont. 39, is nevertheless (in absence of exceptional facts) ultimately taxable to the losing party, whose wrong occasioned the appointment, as was declared in Ervin v. Collier, 2 Mont. 605': State ex rel. Cornue v. Lindsay, 24 Mont. 352, 61 Pac. 883.
>
> 'The fees of the receiver may be allowed as costs, and taxed against the losing party upon the entry of final judgment in the action (citing cases). But this does not preclude the court, upon a discharge of the receiver before the conclusion of the action, as was the case here, from fixing his compensation, and adjudging payment thereof against the party at whose instance he was wrongfully appointed': State ex rel. Heinze v. District Court, 28 Mont. 227, 72 Pac. 613.
>
> "In McAnrow v. Martin, 183 Ill. 467, 56 N. E. 168, the court said: 'When a receiver obtains possession of money or property under an order which is afterward reversed on appeal, and he is required to restore the money to the person entitled thereto, he cannot claim compensation out of the funds in his hands, but must look therefor to the party who secured his appointment: Weston v. Watts, 45 Hun. 219; French v. Gifford, 31 Iowa 428; Verplanck v. Mercantile Ins. Co., 2 Paige 438; Radford v. Folsom, 55 Iowa 276, 7 N. W. 604'. The same doctrine is announced in Beach on Receivers, par. 119; Richmond v. Irons, 121 U. S. 27, 7 Sup. Ct. Rep. 788, 30 L. ed. 864; People v. Jones, 33 Mich. 303; Welch v. Renshaw, 14 Colo. App. 528, 59 Pac. 967. As was said in Ogden City v. Bear Lake etc. Irr. Co., 18 Utah 279, 55 Pac. 385: 'The expenses incurred by the receiver that would have been necessary for the appellant to incur, had it remained in the possession of its property, and in the control of its business, were properly paid out of the fund, but such as it would not have been necessary for

> it to incur should be charged to the party procuring the order. Such expenses shall be regarded as incurred in consequence of an error at his instance: Weston v. Watts, 45 Hun. 219; City of St. Louis v. Gaslight Co., 11 Mo. App. 237; Pittsfield Nat. Bank v. Bayne, 140 N. Y. 321, 35 N. E. 630; Moyers v. Coiner, 22 Fla. 422; French v. Gifford, 31 Iowa, 428.' See, also, Cassidy v. Harrelson, 1 Colo. App. 458, 29 Pac. 626."

In *Richmond v. Irons,* 121 U. S. 27, the Supreme Court found that "the receiver was not necessary to " the enforcement of the liabilities of the stockholders" of an insolvent National Bank. The court said at page 64:

> "The next question arises upon the objections of the appellants to the allowance made in the decree of twenty per cent. of the amount of the debts of the bank due to the date of the suspension, in addition thereto to cover the expenses of the receivership. The sum, we think, ought not to have been allowed. *The ordinary costs of the cause* are, of course, taxable against the defendants as in other cases, but we see no reason why stockholders should be required to contribute as a debt due from the bank, or themselves, to a fund for the expenses of the receivership."

And further at page 66:

> "*No receiver is necessary in ordinary cases,* and there is nothing in the circumstances of this case to make it an exception. Whatever costs and expenses should be paid on account of the receivership in this case, beyond an allowance made heretofore and paid, if any, *should come out of the creditors at whose instance the receiver was appointed, and not out of the stockholders.*"

It is, therefore, the rule in the federal courts and in the State of California, the domicile of the Presidio Mining Company, that where the appointment of a

receiver is contested and it is finally determined that the appointment was illegal, erroneous or unnecessary, that the costs and expenses of the receivership should be adjudged against the party at whose instance he was appointed. Founded, as it is, on sound equitable principles, the rule seems to be universal.

One of the early cases in which this proposition is laid down is *French v. Gifford,* 31 Ia. 428. In this case, an appeal was taken from the order taxing the receiver's costs in which it was ruled that of his compensation one-third should be paid out of the funds in his hands, and the other two-thirds taxed as costs against the plaintiff in the action. In speaking of the cases where the costs and expenses of the receivership were paid out of the fund, the court said:

> "Upon an examination of these cases it will be found that in every case there was no question made as to the legality or propriety of the appointment of the receiver; that in each case the receiver closed up the business and settled his accounts in pursuance of his appointment. * * * We think it would be an unjust and inequitable rule, if in all cases the receiver should be entitled to his compensation from the fund in his hands, without reference to the legality of his appointment. Under the operation of such a rule innocent persons might be made to suffer great loss."

In *Lockhart v. Gee,* 3 Tenn. Chan. 332, the court said:

> "Having no right to a receiver, the complainant is, of course, liable to the defendant for all the consequences of having had one appointed. Costs of receivership, including the compensation of the receiver must, therefore, be paid by the complainant."

In *Ruling Case Law,* Vol. 23, at page 106, we find the following:

> "It may be stated as a general rule, however, that *where there is no question as to the legality or propriety of the appointment of the receiver,* the receiver's compensation and expenses are payable from the funds in his hands, no part thereof being taxable against the party at whose instance the receiver was appointed. Many cases hold that the receiver is entitled to receive compensation for his services and reimbursement for his expenditures, in the first instance, from the funds which come into his possession, regardless of who is ultimately successful or is ultimately liable to pay them. Where a court has no power or authority to appoint a receiver in any event, *or where, though the court has authority, the appointment is improperly made,* there are numerous decisions to the effect that the receiver cannot have his compensation or expenses paid from the property in his hands, but must look to the party at whose instance he was appointed."

As said in *Cutter v. Pollack,* 4 Dak. 205, 50 A. S. R. 644:

> "If the receiver is allowed to pay, and reimburse himself out of moneys in his hands, the decree should provide whether the owner of such moneys shall be indemnified by the recovery of judgment against some other party to the case for the invasion of his property."

It is true that in the last mentioned case the court was speaking of a final decree in the suit which, however, included the receiver's final account. It was a case in which a receiver had been appointed *on motion of the plaintiffs, and against the opposition of the defendants.* The lower court directed that the fees and expenses of the receiver, which, however, were not settled by the court, should be taxed by the clerk of the court as costs in the case against the plaintiff, and that the amount of

the costs should be inserted in the judgment. "These items (said the court), we are clear have no place in a bill of costs". The directions to the trial court read as follows:

> "*The judgment is reversed*, and the district court is directed to enter a new judgment after all matters connected with the receivership have been investigated and settled. But the case will not be reopened for a new trial on the merits. The question of the right of the defendants to the funds in the hands of the receiver is settled, subject to such modification. The district court, without reopening questions touching the merits, will inquire into the amount of property and money in the hands of the receiver, or for which he is properly chargeable; will ascertain what compensation is proper, what disbursements actually made were necessary; will determine whether the receiver shall be paid and reimbursed out of the fund in his hands, and what proportion of his fees and expenses ought to be borne by the plaintiffs and defendants, respectively, or whether the plaintiffs ought ultimately, or in the first instance, to pay all of such fees and expenses. All these matters should be embodied in the findings and the final judgment. We do not wish to be regarded as holding that the decision of the district court upon these various questions will be final. It is possible they may be subject to review. There is also an appeal from an order of the district court made on appeal from the taxation by the clerk of the receiver's fees and expenses as costs, which order affirms such taxation. This order is reversed for the reasons already stated.
>
> All concur."

It follows, therefore, that in making a final disposition of the receivership, the court must decide everything that is essential to such disposition. It must in the first instance determine whether or not the receiver is entitled to any compensation at all. If it decides that he is, it must direct the mode of his payment. If he

shall be paid out of the fund, the court must determine whether such payment is a final disposition of that particular question, or whether the amount of his compensation and expenses shall be restored to the fund by a judgment against the party procuring his appointment. The court may direct him to restore the fund without deduction, and direct a judgment in his favor against the party procuring his appointment; or it may direct that his compensation and expenses be apportioned between the parties according to their respective equities. This phase of the case we have discussed in our opening brief, and will not repeat the arguments here. We there contended that as between the complainants who procured this illegal receivership, and the defendants, the equities are entirely in favor of the defendants, and that the entire costs and expenses of the receivership must be adjudged against the complainants.

On this branch of the case we will do no more than to cite the following cases which are instructive on the general question here involved. An examination of these and many other cases on the subject will develop this principle: that whenever the costs and expenses of the receivership were paid out of the fund it was either (1) a case in which the receivership was legal and proper, or (2) a case in which the appointment of the receiver was erroneous, or even void, but in which the adverse party had either expressly consented to the appointment, or had acquiesced therein and permitted the receiver to proceed in the administration of his duties without protestation.

When in our petition to the trial court to reconsider its order to appoint the receiver, we offered to pay into court the sum of $61,155.60 to be held by the court

> "as a bond to insure the payment of any money judgment which the complainants may recover, either for the benefit of the Presidio Mining Company, or for the benefit of themselves as and for costs and counsel fees in this suit",

this court in its opinion on rehearing said:

> "Why was not this offer sufficient security for any decree that might be entered in the case" (270 Fed. at 402).

We now ask can the complainants in the face of this offer and this finding successfully contend that they sought the receivership in good faith? And when the receiver is shown *to be appointed and continued* through fraud or illegal conduct of the parties asking for such receiver, costs and expenses of the receivership should be charged against such parties. *Miller v. Am. Light, etc. Co.*, 181 Ill. App. 623.

The additional cases to which we have referred are the following

Federal cases.

Harrington v. Union Oil Company, 144 Fed. 235;
McIntosh v. Ward, 159 Fed. 66;
Fryer v. Weakley, 261 Fed. 509;
Amer. Engineering Co. v. Met. By Products Co., 280 Fed. 677, 682;
Cooper v. Shirley, 75 Fed. 168 (9th Circuit);
In re Locov, 142 Fed. 960;
Chicago Title Co. v. Newman, 187 Fed. 573;
Wallace v. Loomis, 97 U. S. 146;
In re T. E. Hill Co., 159 Fed. 73;
Huff v. Bidwell, 218 Fed. 6.

State cases.

Lockhart v. Gee, 3 Tenn. Ch. 332;
Myers v. Hines, 182 S. W. (Ark.) 542;
Excelsior etc. Co. v. Rieff, 155 S. W. (Ark.) 921;
Burroughs v. Merrifield, 90 N. E. (Ill.) 750;
Bellamy v. Washita etc. Co., 25 L. R. A., N. S. 412;
Nutter v. Brown, 1 L. R. A., N. S. 1083;
Brock v. Rudug, 119 N. E. (Ind.) 491;
Herndon v. Huter, 19 Fla. 397;
Verplank Mercantile Ins. Co., 2 Paige 438;
French v. Gifford, 31 Iowa 341;
Central Trust etc. Co. v. Chester etc. Co., 80 Alt. 801 (Del.);
Frick v. Fritz, 124 Iowa 529;
Miller v. Am. Light, etc. Co., 181 Ill. App. 623;
Hendric Mfg. Co. v. Parry, 86 Pac. (Colo.) 113;
Welch v. Renshaw, 59 Pac. (Colo.) 967;
Tome. v. King, 21 Atl. (Md.) 279;
McAndrow v. Martin, 183 Ill. 467;
Weston v. Watts, 45 Hun. 219;
Higley v. Dean, 168 Ill. 266;
Hickey v. Parrott etc. Co., 32 Mont. 143; 108 A. S. R. 510;
Carroll v. Haigh, 108 Ill. App. 264, 269-270;
Howe v. Jones, 23 N. W. (Iowa) 376;
Phillip v. Hudson Film Co., 143 N. Y. S. 759;
Link Belt Machinery Co. v. Hughes, 195 Ill. 413;
City of St. Louis v. St. Louis Gas-Light Co., 11 Mo. App. 237;
Radford v. Folsom, 55 Iowa, 276;

People v. Jones, 33 Mich. 303;
O'Mahoney v. Belmont, 62 N. Y. 133;
Grant v. Los Angeles Ry., 116 Cal. 71;
Cassidy v. Harrelson., 1 Colo. App. 458; 29 Pac. 525;
Sullivan v. Gage, 145 Cal. 759.

A MORE COMPLETE ANALYSIS AND CRITICISM OF APPELLEES' AUTHORITIES.

In support of the contrary proposition: that the liabilities which the receiver incurs are in any event liabilities chargeable upon the property under his control, the receiver cites: *Atlantic Trust Co. v. Chapman,* 208 U. S. 360; *People v. Oriental Bank,* 114 N. Y. Supp. 440; *Sullivan Timber Co. v. Black* (Ala.), 48 So. Rep. 870; *Palmer v. Texas,* 212 U. S. 118.

But none of these cases even remotely support the contention of the receiver and the other appellees

The case of *Atlantic Trust Co. v. Chapman,* 208 U. S. 360, was not a case in which the defendant resisted the appointment of the receiver, and took an appeal from the order of appointment, and secured a discharge of the receiver. We read on page 366:

> "The court, on the motion of the Trust Company, the Canal and Irrigation Company *appearing and consenting thereto,* appointed E. C. Chapman receiver of the mortgaged property with the authority to take possession of it";

and at the beginning of the opinion we find this statement:

> "The principal question in this case—now before us upon writ of certiorari for the review of a final order of the Circuit Court of Appeals for the Ninth Circuit—is stated by counsel to be this: Is a complainant, who has in good faith prosecuted a suit upon a good cause of action, and upon whose application the court has properly appointed a receiver, and who obtains a decree fully establishing his rights, nevertheless personally responsible for a deficiency caused by the failure of the property which is the subject of the suit to bring enough to cover the allowances made by the court to the receiver and his counsel, and the expenses which the receiver, without special request of the complainant in any instance, had incurred?"

Again on page 375, the court says,

> "Here, it is not asserted that the plaintiff trustee was not in the exercise of his strict rights when bringing a suit for foreclosure and sale and asking that the property be put in possession of a receiver."

How different from the case at bar!

Referring to *People v. Oriental Bank,* 114 N. Y. Supp. 440, the receiver quotes a few lines from the opinion (separated from the facts) which he emphasizes; but as a matter of fact nothing is decided by the court except that it will not take up the exceptions to the receiver's account until that account comes before it after passing under the scrutiny of a referee. Here is the short opinion in full:

> "*Per Curiam.* It accords with the long-established practice of the court to subject the accounts of receivers to the scrutiny of a referee before passing upon them, when, as in the present case, large sums have to be accounted for. The questions sought to be raised by the

exceptions can best be disposed of on the coming in of that report. It cannot be said now, as matter of law, that the receivers are entitled to no compensation because the order appointing them was vacated. That vacation did not proceed upon the ground that the court was without jurisdiction to appoint receivers ex parte, but upon the ground that, having such jurisdiction, it was improvidently exercised. When all the facts are before the court, it can be determined what allowance, if any, should be made to the receivers for their compensation and expenses. The order is not drawn in the usual form, and should be modified, so as to provide that the accounts of the receivers and the objections thereto be referred to the referee named in the order appealed from, and that he report thereon, with his opinion, as well as upon the question as to what compensation and expense, if any, should be allowed to the receivers, and by whom the same should be paid, and, as so modified, will be affirmed, without costs in this court.

Settle order on notice."

We are next referred to the case of *Sullivan Lumber Company v. Black,* 48 So. Rep. 870. This is a case in which the Supreme Court of Alabama decided that under the law of that state the compensation of the receiver, and fees for his attorney, should be paid out of the fund in the first instance notwithstanding the fact that the receiver was improperly appointed, and the bill was ordered dismissed, because in Alabama there is a statute providing that before a receiver can be appointed, he must execute a bond conditioned that he will pay all damages which any person may sustain by his appointment as such receiver, should his appointment be vacated.

The court says:

"It may be said that a sufficient answer to the argument (that the receiver's costs and expense should be

taxed to the complainant) is that before the complainant could have himself appointed receiver *under the laws of this State,* he was required to execute a bond conditioned that he would pay all damages which *any person might sustain by reason of his appointment* as such receiver, should his appointment be vacated. As the appointment has been vacated, the *respondent,* as well as all other persons, have a remedy by action upon the bond to recover all such damages as they may have sustained."

Alabama is not a Code state, and the Courts of Equity and Law exist distinct and separate, and the court held that it had no jurisdiction as a court of equity to enter a judgment upon the bond. The court says, at page 877:

"*The Chancery Court is not the proper tribunal,* nor is the present action the proper one, in which to determine the amount of damages, if any, which the respondents or others may have sustained by the appointment of the receiver. So, if the respondents have suffered damages by reason of the receiver, or unauthorized act of the complainant in having the receiver appointed, they are not without remedy, whatever may be the decree of the Chancery Court or of this Court in allowing or apportioning the costs in the Chancery Court. It may be that it would be better for all of these matters to be determined by the same tribunal and in the same action, *yet such is not the law nor the practice in this State.* What we have said above, of course, is not intended to control in any action that may be brought in a court of law upon the receiver's bond, but is only intended as an answer to the persuasive arguments of the learned counsel against the decree of the Chancellor, which is in most things affirmed by this Court."

We respectfully submit that the quotation made by counsel in his brief, separated from the facts of the case, is misleading.

The receiver then (pp. 10, 11, 12 and 13) enters into an elaborate analysis of the case of *Texas v. Palmer,*

(212 U. S. 118). We substantially agree with the analysis, but not with the conclusion that the case "is on all-fours" with the case at bar as to the principle involved.

In the first place, when the plaintiff Palmer walked into the federal court asking for a receiver, the defendant corporation stood by his side and joined in the prayer. (1) Here was consent to the receivership; and the defendant by its consent was more responsible for the appointment than was Palmer himself who was a small stockholder in the corporation. (2) The corporation defendant had given a supersedeas bond in the state court proceedings and was, therefore, entitled to remain in possession of its property pending the appeal in the state court. But it saw fit in the meantime to have a receiver appointed over its property in the federal court. Why should it not pay for the care and custody of its property? Who can gainsay that Palmer, this small stockholder in the corporation, should not be made the scapegoat, and that under these circumstances "justice will be done if costs of receivership are paid out of the fund realized in the federal court".

Had the Presidio Mining Company in the case at bar expressly consented to the appointment of a receiver, it might be argued with some semblance of logic, that there was a parallelism between the Palmer case and this; but when the *consent* in the Palmer case is contrasted with the *unceasing objection* in this case, the two are "as far apart as the poles" to quote the learned judge of the District Court.

It is further suggested that the State of Texas was the real party in interest, and the payment out of the fund

> "would deplete the total of the property which was already insufficient to pay the State's judgment, and would compel the State to have recourse on the supersedeas bond".

The answer is that the state was amply protected by the supersedeas bond; did not raise the question, and somebody had to take care of the property pending the litigation. As the receiver had done so with the *consent of the defendant,* he should, of course, be paid for his trouble and reimbursed in his legitimate expenses. After referring to various items of expenditure by the receiver which are claimed to have been made with the consent of the defendants, it is claimed on page 20 of the receiver's brief that

> "all other sums expended by the receiver and objected to and excepted to are covered by the orders of confirmation and allowance for the years, 1918, 1919 and 1920, none of which orders were appealed from, and it is contended that whatever these orders may be as between the parties, based upon the stipulations of the parties or the objections and exceptions made as between them during these years, *that as between the receiver and each of the parties the order of confirmation and the allowance in each instance was a final appealable order as to each item allowed*".

We will later take up the question as to any consent to any specific item; but will first direct our attention to the effect of the orders of the court allowing the annual accounts of the receiver.

The cases which the receiver cites to the point that the intermediate accounts of the receiver *were appeal-*

able do not sustain his position, with the single exception of *Ruggles v. Patton,* 143 Fed. 312. *Ruggles v. Patton* is, however, in conflict with the rule laid down in this Circuit in the case of *Heinze v. Butte etc. Co.,* 129 Fed. 337; and an examination of the authorities cited in the Ruggles case on which the conclusion in that case is founded will disclose the fact that they do not sustain the conclusions there reached.

The Ruggles case was decided in the 6th Circuit by Judge Lurton in February, 1906. An appeal had been taken from an order allowing the receiver $20,000 as compensation for the year 1904. The decision says:

> "The case is in narrow compass. The receiver contends that the order is *not final,* because he construes it as a mere payment upon account, and that the fund paid to himself under the order will continue to be subject to the order of the Court, and his bond responsible for obedience to any order settling his compensation at a less sum, and recalling any sum received in excess of compensation allowed upon a final settlement."

In holding contrary to the receiver's own contention, Judge Lurton cites as his first authority *Williams v. Morgan,* 111 U. S. 684. This was a railroad foreclosure suit, and there was no question as to propriety of the allowance of $10,000 per annum made to the receiver. But after sale of the road the court made an order allowing the trustees under the mortgage an allowance of $79,083.28 out of the proceeds. From this allowance an appeal was taken by Williams and Thompson who were the purchasers of the road representing certain bondholders who were entitled to the net proceeds. The order settled an independent side issue in the case, quite foreign to the administration of the receiver, and

had no bearing upon any interlocutory order approving the accounts of the receiver. In fact it is difficult to understand why an order such as was made in the Ruggles case would not be appealable if no receiver had been appointed.

The next case cited by Judge Lurton is his own decision *In re Michigan Cent. R. R. Co.,* 124 Fed. 727. The substance of that case is thus stated in the syllabus:

> "A decree of the Circuit Court against a litigant, allowing costs to the clerk as a matter of positive law, under a statutory provision, is not one made in the exercise of the Court's discretion, as in the allowance of costs as between the parties, and is appealable."

Judge Lurton himself says at page 734:

> "Nor is it essential to the right of appeal that the allowance shall be made from a fund in court. If there is no fund, and the court undertakes to provide one by pronouncing a decree against one of the parties to the proceeding, and directs execution to issue, every reason exists for allowing a review which could possibly exist when an allowance is made out of a fund in which the appealing party has only an interest."

On page 314, last paragraph, the opinion in the Ruggles case contains this statement:

> "We think that the direction that the receiver should pay to himself $20,000 for a specific service already rendered was a complete withdrawal of that part of the funds from the Court's possession. The case falls under the authority of In re Michigan Central Ry. Co., cited above; Trustees v. Greenough, 105 U. S. 527, 531, 26 L. Ed. 1157; Edgell v. Felder, 99 Fed. 324, 39 C. C. A. 540; Tuttle v. Claflin, 88 Fed. 122, 31 C. C. A. 419."

The Greenough case is not a case involving allowances to the receiver and his counsel, nor expenditures voluntarily made by the receiver and reported by him

to the court, and approved by it by an interlocutory decree; but it was a case in which a plaintiff Francis Vace, suing on behalf of himself and other bondholders, had brought a large fund into court, and expended large sums of money in this behalf before a receiver was appointed. After the appointment of the receiver, Vace filed his petition seeking reimbursement out of the fund which he had thus brought into court. The court allowed him $60,131.96, and the appeal was from this order of allowance. The Supreme Court said (p. 531):

> "The first question, however, is whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are certainly a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision. The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but under all the circumstances we think that the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal."

The Greenough case did not involve expenditures in the receivership at all, and does not support the doctrine of the Ruggles case, and this fact is pointed out by Judge Gilbert of this court in the Heinze case where, at page 338 (129 Fed.) we find the following comment:

> "It is true that the Supreme Court has recognized an exception to the general rule that an order made be-

fore the final disposition of a cause, and before the final account of a receiver is filed, is not appealable, in the case of Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157. That was an appeal from an order directing that the complainant in the suit be paid out of the fund in the receiver's hands the costs, expenses, and counsel fees incurred by him in a suit which he had brought against the trustees of bonds issued by a corporation and secured by a trust fund, to secure the due application of the trust fund and prevent the waste thereof, the result of which suit was to bring the fund under the control of the court for the common benefit of all the bondholders. The expenses and fees were not incurred by the receivership, but preliminary thereto, and in preserving the trust fund from waste. The court, not without apparent hesitation, sustained the appeal, on the ground that the order was a final decision in a collateral matter. Said the court, 'Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision'."

Engell v. Felder, (99 Fed. 324), is another case cited by Judge Lurton in the Ruggles case, which does not involve expenditures in the receivership, but an entirely independent collateral matter. The question involved is thus stated in the syllabus:

1. Appeal—Final Decree.

A decree in favor of persons not technically parties to the suit, but whose appointment and employment therein had been authorized by the court, to render designated services, and whose claims for compensation, on proper petition of the special master and on due hearing, were fully adjudicated, and ordered to be paid out of the fund in the registry of the court, as a part of the costs of administration of the same, which decree provides for its immediate execution, by ordering that the clerk draw checks, for the signature of the judge, on the fund in the registry of the court, for the allowances made to the claimants, is a final decree, for the purposes of appeal.

2. Same—Parties—Receiver.

The fund affected by a decree for payment of persons employed by authority of the court, in a suit in which a receiver was appointed, being in the registry of the court, and the payment being ordered by a check drawn by the clerk of the court, and signed by the judge, the receiver is not affected by the decree, and hence is not a necessary party to an appeal therefrom."

The last case cited by Judge Lurton in the Ruggles case in the above quoted summary is *Tuttle v. Claflin,* 88 Fed. 122; 31 C. C. A. 419, and this likewise does not involve expenditures in the receivership, but an outside independent collateral matter, which is summarized in the syllabus as follows:

3. Same—Appealable Final Decree.

A decree entered in a proceeding by attorneys to enforce a lien for their fees, which adjudges that they are entitled to compensation to a definite amount and have a lien therefor on a fund in court, and directs payment thereof, is a final appealable decree, although the residue of the fund may not have been finally disposed of.

It thus becomes apparent that Judge Lurton in the Ruggles case entirely overlooked the distinction between an order directing the payment of money in an independent collateral matter arising in a suit, and the expenditures by a receiver in the receivership. In the Heinze case Judge Gilbert points out that the ruling in the Greenough case was followed in *Hovey v. McDonald,* 109 U. S. 150; *Williams v. Morgan,* 111 U. S. 684; *Tuttle v. Claflin,* 88 Fed. 122; and *Grant v. Los Angeles, etc. Ry. Co.,* 116 Cal. 71, and then says:

"But we find no decision holding that an appeal may be taken from an interlocutory order confirming a receiver's report, or directing the receiver to pay expenses incurred by him, before the coming in of his final ac-

> count, except the decision of the Supreme Court of North Carolina in Battery Park Bank v. Carolina Bank, 36 S. E. 39, where the appeal was sustained, not upon any recognized principle applying to appeals from interlocutory orders, but upon the ground that such an order is in effect a final appropriation of a part of the assets, and 'no harm can come to any one interested in the suit by regarding it as final'."

Indeed, we may add that after an exhaustive research up to the present time we have found none other with the exception of the Ruggles case; and counsel for the appellees have been no more successful than ourselves.

On page 22 of his brief the receiver refers us to the following quotation from the Ruggles case:

> "The fact that he was the Court's receiver and that he continues to be the Court's receiver gave the Court no more authority to call back a fund which he was directed to pay to himself in the absence of a reservation to that effect than it could exercise over any other party obtaining funds through the order of the Court."

We respectfully submit that this is the statement of an unsound principle of law. Where a party or a stranger files a petition in a suit seeking to have paid to himself all or a portion of a fund in court, he initiates an independent proceeding in the suit, and if the petition is by a stranger, the court acquires jurisdiction over him in so far as this independent proceeding is concerned. If his petition is denied, that is a final disposition of the matter, and the petitioner has the right of appeal; and conversely, if the petition is granted that is likewise a final disposition of the matter, and any one interested in the fund has the right of appeal. If no appeal is taken, the court loses jurisdiction over

the petitioner with the expiration of the time for appeal. But not so with regard to the receiver. He is an officer of the court, and the court's jurisdiction continues over him, and all his proceedings and the matters in his charge until his final account is settled, and then until the time has expired for appeal from the order settling his final acount. In regard to an order directing the payment of a fund in court to a party or a stranger upon his petition, the rule we have stated would be the same if there were no receiver in the suit. The fact that there is a receiver, and that the court directs the receiver to pay the money, is a mere accidental incident in the proceeding. It was the failure of Judge Lurton to observe this fact that led him to cite such cases as *Trustees v. Greenough* and *Williams v. Morgan* as authority for his conclusions in the Ruggles case which led him into a fundamental error.

Also on page 22 of his brief the receiver cites *Pennsylvania Co. v. Pennsylvania,* 266 Fed. 1, a case which cites the Ruggles case and the Greenough case. But a reading of the case, as well as the receiver's own statement of it, shows that here was a petition by one of the parties to the main suit "to be reimbursed for moneys it had advanced". The petition was granted in part and the receiver and other parties appealed. Here again the receiver was a mere incident. If the fund directed to be paid had been in the hands of the clerk of the court, the identical questions of law would have been presented.

Finally the receiver in closing his citation of authorities, page 24, says:

> "The above case of Ruggles v. Patton is also approved in the case of Bankers Trust Company v. Missouri, etc., Ry. Co., 251 Fed. 789, which was a receivership, and an administrative order was held to be a final order, the Court (bottom of p. 796) saying:
>
> 'The compensation of receivers is usually fixed by administrative orders, *and those orders are reviewable by the Appellate Court generally* as interlocutory, but sometimes as final orders.' "

Following this quotation the court cites *Ruggles v. Patton,* 143 Fed. 312; 74 C. C. A. 450.

Then counsel continues:

> "The reasoning of the Court in the last case following the above excerpt would lend support to the intimation in the opinion in the Heinze case, commencing on p. 339 (129 Fed.), that whenever the orders approving the receiver's account are held to be interlocutory, they are subject to review on appeal from the final decree disposing of the entire case, but would not help appellants on this appeal, *because such a final decree is yet to be entered.*"

But right here we differ with counsel, as we have pointed out in another part of this brief. We claim that the court committed error when it split its order by settling the final account of the receiver and discharging him and exonerating his bond. But in *Bankers Trust Co. v. Missouri K. & T. Co.,* no settlement of a receiver's account, interlocutory or final, was under consideration at all. The orders there under consideration were administrative orders consolidating various suits foreclosing mortgages on a complicated system of railroads and extending a receivership to these vari-

ous consolidated suits; and immediately after the quotation made by the receiver that "the compensation of receiver is usually fixed by administrative orders, and these orders are reviewable by the appellate courts *generally* as interlocutory, but sometimes, as final orders, *Ruggles v. Patton,* 143 Fed. 312, 314, 315; 74 C. C. A. 450, 452, 453", the court proceeds:

> "The general rule is that, upon an appeal from the final order or decree in a proceeding in equity, such as a foreclosure suit, or foreclosure suits, all the preceding interlocutory orders and decrees, affecting the rights or equities of the parties regarding the matters in controversy between them, are subject to review in the Appellate Court, and may be heard and decided at the same time."

The receiver had not filed a final account and had not been discharged. The court was not dealing with a *split order* designed to be final as to certain matters and interlocutory as to others. It was dealing solely with "administrative orders", and states its conclusion (251 Fed. at 797) as follows:

> "The conclusion is that, as appellants were entitled to both the right of review of the administrative orders in question by an appeal from the final order and decree that shall be made *in the causes, and also to the receiver and the impounding of the income for the benefit of its bondholders, and as the clause of the order under discussion completely deprived it of one of those rights,* it was a final decision affecting a substantial right of the *appellant and the bondholders he represents, and it made the order which contained it appealable.*"

So in the case at bar, we say that as the clause in the order from which we have appealed completely deprives the defendants of any relief against the re-

ceiver by settling his final account and discharging him and his bondsman, it is a final decision affecting a substantive right of the defendants and is appealable.

In conclusion we hardly need draw the attention of the court to the fact that it is the law of this case, established in the former appeal, that the appointment of the receiver and his administration was an illegal invasion of the rights and property of the Presidio Mining Company.

Our claim that there was not even a semblance of justification for this receivership, is clearly sustained by this court in the entirety of its several opinions, but is particularly emphasized when this court said, after a full review of the evidence that:

> *"upon this evidence we did not direct a dismissal of the action as we might have done"* (270 Fed. at 405).

Finally, for the convenience of the court we will tabulate the sums involved in this appeal. In the second interlocutory account filed by the receiver (p. 367 of the record on this appeal) will be found an item of $2500.00 paid to the Master in Chancery as his fee for taking the account ordered by the interlocutory decree of the trial court. As the record discloses, the appellants objected to the taking of this account because an appeal from the interlocutory decree had been taken. The appellees insisted upon proceeding with the accounting and the master overruled appellant's objections. After the master's report had been filed with the court, and the appellants had filed their objections thereto, the court ordered the receiver to pay the master's fees.

This item of $2500.00 was not expended by the receiver in the course of his administration, but he was ordered to pay the same by the court, and under the principle of *Trustees v. Greenough* (105 U. S. 527), we concede that we should have appealed from the order directing this payment in so far as the receiver was concerned. But on the other hand we contend that the appellees, having wilfully and unlawfully caused the expenditure, should be charged with this item and directed to repay the same to the Presidio Mining Company.

The following is the tabulation mentioned above:

$14,729.10	Contained in the receivers first account the objection to which is found on p. 362 of the present record and the subject of Exception XII.
$20,900.96	Contained in the second account, the objection to which is found at p. 367, and the subject of Exception XIII (The item of $2500.00 paid to the Master in Chancery is in this account, leaving other items aggregating said sum of $20,900.96.)
$16,950.00	Contained in the third account, the objection to which is found at p. 373, and the subject of Exception XIV.
$ 2,650.00	Contained in the fourth account, the objection to which is found at p. 374, and the subject of Exception XV.
$55,230.06	At the time of filing the fourth account.

This is the sum of $57,730.06 mentioned on the last line of p. 428, minus the sum of $2500.

There was also a balance on hand of $4475.00 when said fourth account was filed (334), $59.68 interest collected (505), $10.00 paid out for clerk's fees, leaving a balance of $4524.68 (505); the objection to the disposal of that

balance is found at p. 374, the order directing its disposal is found at pp. 505-6, the disposition thereof *on Sept. 29th, 1921,* is shown on p. 508, and Exception X covers the subject.

The total amount involved herein is therefore $55,230.06, the total of the sums objected to in the four accounts, plus the balance of $4524.68 subsequently absorbed, making the total sum of $59,754.74.

In the judgment which should be entered against the complainants, however, the above sum of $2500.00 should be added, making as to them the total of $62,254.74.

Dated, San Francisco,
December 23, 1922.

Respectfully submitted,
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Henry E. Monroe,
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J. J. Dunne,
Of Counsel.